

5832

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X
UNITED STATES OF AMERICA : 13-CR-607

-against- US District Court
Central Islip, NY

PHILLIP A. KENNER a/k/a
PHILIP A. KENNER, and
TOMMY C. CONSTANTINE a/k/a
TOMMY C. HORMOVITIS,

Defendants.: July 6, 2015
- - - - - X 9:30 a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:

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SARITA KOMATIREDDY, ESQ.
United States Attorneys

For the Defense:

RICHARD D. HALEY, ESQ.
For Defendant Kenner

ROBERT LaRUSSO, ESQ.
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For Defendant Constantine

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Proceedings recorded by mechanical stenography.
Transcript produced by CAT.

Stephanie Picozzi, CRR, RPR
Official Court Reporter

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1 THE CLERK: Calling case 13-CR-607, United States v.
2 Kenner & Constantine.

3 Appearances please.

4 MR. MISKIEWICZ: James Miskiewicz for the United
5 States.

6 THE COURT: Morning, Mr. Miskiewicz.

7 MS. KOMATIREDDY: Sarita Komatireddy for the
8 United States.

9 THE COURT: Morning, Ms. Komatireddy.

10 MR. LaRUSSO: Robert LaRusso for Mr.
11 Constantine.

12 THE COURT: Good morning and good morning, Mr.
13 Constantine.

14 MR. HALEY: Rick Haley for Phil Kenner.

15 THE COURT: Good morning and good morning, Mr.
16 Kenner.

17 Before we bring the jury out, we did post
18 revised jury instructions. My law clerk read through one
19 more time and there were just a few except for the
20 addition of venue instruction, typographical,
21 non-substantive terms.

22 Let me go through them.

23 Page 24, the expert testimony instruction, it
24 said in the third paragraph: You should consider the
25 witness' opinion received and we made clear because there

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1 was more than one you should consider each expert witness'
2 opinion.

3 On page 39, comparing the indictment versus what
4 we had, we took out a comma after the word "sounds." And
5 on Count Two added a period into Count Two.

6 The Statute of Limitations instruction for
7 conspiracy Count One was at the end of element 2 on page
8 60. She moved that to the end of element 3. So it will
9 be the end of the elements where it was supposed to go.

10 Aiding and abetting on page 63 said: For Counts
11 Two through Eight 2. As I confirmed with the government,
12 they are not using aiding and abetting for purposes of the
13 Sag Harbor transactions so it's changed to Counts Two
14 through Six.

15 Now page 89 is the venue instruction. We posted
16 this this morning. I assume you didn't have a chance to
17 look at it. If you have a chance to look at the venue
18 instruction, I want to make sure everyone is okay with
19 that.

20 MR. LaRUSSO: No objection.

21 MR. MISKIEWICZ: No objection.

22 MR. HALEY: No objection.

23 I didn't realize it was only the preponderance
24 of the evidence standard.

25 THE COURT: That's the only thing, it's by a

Summation - Haley

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1 preponderance.

2 MR. HALEY: Learn every day, Judge. Thank you.

3 THE COURT: Let's bring in the jury.

4 Mr. Haley, ready to go?

5 MR. HALEY: Yes, sir.

6 THE COURT: Let's bring in the jury.

7 (The jury enters the courtroom.)

8 THE COURT: Please be seated.

9 Morning, members of the jury. I hope you all
10 enjoyed the holiday weekend.

11 We are ready to continue now with the closing
12 arguments or the summation of the lawyers. You will
13 recall Mr. Haley was in the middle of summation when we
14 broke on Thursday so we will continue.

15 Go ahead, Mr. Haley.

16 MR. HALEY: Thank you, Judge.

17 To tell the truth, the whole truth and nothing
18 but the truth, that was the oath that each witness took in
19 this trial before they testified. And when they gave that
20 oath, you had an expectation that's what you would hear.
21 In the same vein, when the government brings criminal
22 charges against an American citizen, you have the right to
23 expect, if not demand, that what you will hear from the
24 government witnesses, the government's proof will be the
25 truth, the whole truth and nothing but the truth.

Summation - Haley

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1 You will make a determination, ladies and
2 gentlemen, as to whether John Kaiser, as I said at the
3 beginning of my summation the other day, was wholly
4 truthful. As relates to other government witnesses, I'm
5 not here to suggest at all to put them in the same
6 category as John Kaiser. But I suggest to you that they
7 testified in a manner which the government wished them to
8 testify.

9 You know, with reference to government witnesses
10 as they testified on direct and they finished their
11 testimony, you may have said to yourself in your mind
12 seems reasonable, seems truthful. But if upon the
13 cross-examination of that witness, either by way of what
14 they said or by way of documents that were introduced by
15 the defense during the course of the cross-examination and
16 you found those documents perhaps to be inconsistent with
17 what they just testified to, if you were left with the
18 impression "now I'm not so sure that they told me the
19 truth, the whole truth and nothing but the truth," I
20 suggest to you that's reasonable doubt.

21 When a witness hides behind, ladies and
22 gentlemen, the "I don't recall," as we heard time and time
23 again, or when a witness has in front of them a document
24 that may be inconsistent with what they testified to and
25 in an effort to avoid the content of that document they

Summation - Haley

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1 say something like, "oh, sure, I signed it but I didn't
2 read it," you have reason to perhaps suspect that they are
3 not telling you the truth within the whole truth and
4 nothing but the truth.

5 You know, I have an obligation to my client and
6 that is to review and summarize the evidence from our
7 perspective. You have devoted a great deal of time,
8 energy and effort to this case, interrupted your personal
9 life to sit on this trial and it's not my intention to
10 become unduly prolix in my summation but my obligation to
11 my client, as I told you at the beginning, includes
12 providing him with effective assistance of counsel. And
13 we can agree, can we not, that's me.

14 So let's continue what I propose to you is a
15 reasoned analysis of the government's proof devoid of
16 emotive terms as used by the government in its summation.

17 We the other day concluded with respect to the
18 testimony that Mr. Peca had given as relates to the line
19 of credit, the Jowdy line of credit, and at what point he
20 became aware of the Jowdy line of credit. And in that
21 regard during the course of cross-examination Mr. Peca,
22 the question was asked:

23 Question: Well, you were certainly aware that
24 the line of credit committed to Little Isle IV would be or
25 did become the source of the loan to Ken Jowdy with

Summation - Haley

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1 respect to the project Ken Jowdy was developing in Baja,
2 Mexico correct?

3 Answer: Incorrect.

4 But then further on in the testimony,
5 cross-examination, the following question and answer was
6 asked by me and answer given by him:

7 Question: It's not your testimony, is it, sir,
8 that Mr. Ronald Richards coerced you... Withdraw the
9 question. All right.

10 Before the Grand Jury in the Southern District
11 of New York, did you give the following answer to this
12 question:

13 Question: Were you consulted in advance about
14 whether to use the money in Little Isle IV's capital
15 account to loan the money to the Mexico project?

16 Answer: I knew the short term loan was made to
17 Mr. Jowdy.

18 Question: Did you know in advance of it being
19 made?

20 Answer: I probably did. I mean, at the time
21 if I was told about it, I would probably say okay, sounds
22 good. It was probably explained to me. I can't tell you
23 definitely right now that you knew the day or time of the
24 conversation as it was happening. It wasn't like what
25 happened to that. I didn't know it would happen kind of

Summation - Haley

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1 -- I kind of knew what we were doing.

2 Is that the answer you gave to that question?

3 Answer: If it's in the document, yes.

4 Now, Aaron Mascarella testified and there became
5 a question or an issue about the monthly statements
6 regarding the line of credit as to whether or not the
7 instructions given to him by Phil Kenner were only sent to
8 Phil Kenner's address. I want to point out to you at
9 least by way of cross-examination his answers in this
10 regard.

11 Question: So it's your testimony that the
12 monthly statements with reference to the lines of credit
13 and how they were being utilized were being sent by you
14 directly to Phil Kenner, is that correct?

15 Answer: At what period of time?

16 Question: At the period of time when you
17 became involved in the accounts.

18 Answer: The banking accounts?

19 Question: Correct.

20 Answer: So I was in charge of sending Little
21 Isle IV checking account statements. I wasn't part of the
22 lending relationship. I had no control over where those
23 loan statements went and who they went to.

24 Question: Sir, I have to apologize. The
25 mistake was mine. I thought you testified on direct that

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1 the monthly loan statements regarding lines of credit were
2 sent to you exclusively to Phil Kenner pursuant to his
3 request.

4 Answer: By the bank, not me.

5 Question: But you, I guess, had an
6 understanding that the loan -- monthly loan statements
7 regarding the use of the LLCs were being sent only to Phil
8 Kenner, that was your understanding, correct?

9 Answer: I knew a copy was going to Phil Kenner
10 and I would have assumed -- I don't know, it doesn't help
11 you today right now, but that a copy was also sent to each
12 of one of the borrowers.

13 There is, ladies and gentlemen, offered in
14 evidence, actually a defense exhibit, it's Kenner 210, it
15 consists of a bank response to a subpoena with reference
16 to this matter and you will have an opportunity to review
17 these documents. You will see in some of these documents
18 that the monthly loan statement in some of them only has
19 the address of Phil Kenner. You will see that at least in
20 Darryl Sydor's case, you will see both the monthly
21 statement made to his address and a monthly statement
22 mailed to Phil Kenner's address. It's a bank. That's
23 what these records have. In one instance you see both.
24 In a few other instances you see one or you don't see
25 both. I can't account for that, ladies and gentlemen, nor

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1 do I believe Mr. Mascarella's testimony can account for
2 that but that is not a central and critical issue upon
3 which this case turns as I will suggest to you in a
4 moment.

5 Let's leave Little Isle IV and get to Eufora.

6 Eufora, what was the nature of the investment?

7 Well, the indictment reads as follows, to give you a point
8 of reference: Eufora investments. It was a further part
9 of the scheme to defraud that between February 2008 and
10 May 2009 the defendant Phil Kenner convinced Peca, Sydor,
11 Rucchin, Ranford and Nash to invest money in Eufora in
12 exchange for an ownership interest in the company by
13 representing to each of them that Eufora was a promising
14 company with great potential for growth. Is there any
15 proof that that was a false statement? Is there any proof
16 in this record that Eufora is not a promising company with
17 great potential for growth? Has the government convinced
18 you beyond a reasonable doubt that Eufora is not a
19 promising company with potential for growth?

20 You heard from virtually every witness there is
21 risk involved in the Eufora investment but there is also
22 the potential by a multiple of 10 or 20 or more that
23 should that company go public, there would be an explosive
24 return on one's investment much like you see in many cases
25 where there are companies that have privately held stock,

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1 privately held companies, they go public and there is an
2 explosive return, as I said a moment ago, for their
3 investment.

4 The indictment does say: The defendant Kenner
5 and Constantine then unlawfully diverted certain money for
6 unauthorized purposes including for their personal
7 benefit. Yes, they did, ladies and gentlemen. Money was
8 certainly used by Tommy Constantine as relates to whatever
9 he wished to use that money for once he sold a percentage
10 of his ownership interest in Eufora. There is no question
11 and doesn't matter what spread sheet you accept or what
12 exhibit you look at or give credit to whether it's the CR
13 Gentry spread sheet, we will get to that in a moment, or
14 whether it's the information offered to you by Mr.

15 Constantine, that Tommy Constantine had an ownership
16 interest in Eufora; at one point in time the percentage of
17 that, it varied. He had a percentage of ownership
18 interest in Eufora and he was selling, giving up part of
19 that percentage interest in Eufora and the purchasers, the
20 hockey player clients, were acquiring that interest and
21 Tommy Constantine then had every right having given up
22 that percentage interest to use the money as he saw fit.
23 And if that included paying back Phil Kenner for loans or
24 if that included financial transactions between the two of
25 them, that's not illegal, ladies and gentlemen, certainly

Summation - Haley

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1 not a crime.

2 Let's consider that issue because what Phil
3 Kenner told you in his testimony is, he said when I spoke
4 with my clients, I told them who Tommy Constantine was in
5 substance and I told them in substance Tommy Constantine
6 was a man of great wealth but his assets were illiquid
7 meaning caught up in real estate and he was looking to
8 give up, sell, some of his ownership interest in Eufora
9 and in return, you, my client, would have an opportunity
10 to acquire some of that ownership interest which he owned
11 and he was giving up. Nothing illegal about that,
12 certainly not criminal.

13 Well, what did Sydor have to tell you about the
14 conversations as relates to what he and Phil talked about?

15 Question: As it relates to Eufora, isn't it
16 true that you had an understanding that by investing in
17 Eufora, you would be receiving a percentage of ownership
18 interest in that company, true?

19 Answer: Yes.

20 Question: The conversation that you had with
21 Phil Kenner the day he spoke to you about Eufora, how long
22 ago did that occur?

23 Answer: Years ago.

24 Question: Well, could you give us the year, to
25 the best of your recollection?

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1 Answer: I think the conversations about Eufora
2 were around '03 or '04, something like that.

3 2003, 2004?

4 Answer: I believe so.

5 Over a decade ago, correct?

6 It would be that.

7 Question: Did you take written notes of the
8 conversation you had with Phil in terms of what he said to
9 you regarding Eufora?

10 Answer: No. I remember the first
11 conversation, one of the first conversations. We were on
12 the golf course. I didn't write it down.

13 Question: But I take it from that answer, sir,
14 it was more than one conversation about Eufora, true?

15 Answer: I was asked -- we had a conversation,
16 a few different conversations, a few different topics.

17 Question: My question is this, the
18 conversation you had with Phil Kenner back in 2003, 2004
19 were -- based upon that conversation, you made a decision
20 to commit your money to Eufora. I'm talking about that
21 conversation. Did that conversation occur on a golf
22 course or some other place?

23 Answer: I can't recall the exact spot where I
24 committed to it but...

25 But it's fair to say that as relates to that

Summation - Haley

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1 conversation, it wasn't recorded?

2 That's true. Correct. Right.

3 You weren't taking notes in connection with what
4 Phil was saying to you, correct?

5 Correct.

6 But it's crystal clear you had an understanding
7 as a result of that conversation, that in return for you
8 allowing Phil, pursuant to the power of attorney you gave
9 him, to use your money with reference to Eufora, you were
10 going to get an ownership interest? That was your
11 understanding, correct?

12 Correct.

13 Beyond that understanding, do you have a
14 specific recollection as you sit here today about anything
15 else Phil told you about Eufora?

16 I can't sit here and say that I remember. No.

17 So when Phil testified I was telling them that
18 they were acquiring an ownership interest from Tommy
19 Constantine, in return for that Tommy Constantine would be
20 accepting or their investments and from that point on what
21 Tommy Constantine did with the money he did with the money
22 because it was Tommy Constantine's ownership interest to
23 give up.

24 You know, Mr. McKee, similar questions were
25 asked of him. Similar answers were given. I won't go

Summation - Haley

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1 through that. You will have an opportunity to -- you can
2 have an opportunity, both attorneys have told you, at any
3 time to have any testimony read back, if that's your
4 desire.

5 I won't go through McKee's answers except to say
6 you cannot convict and conclude proof beyond a reasonable
7 doubt where individuals cannot give you specifics in terms
8 of a conversation they had and then you surmise what was
9 told or not told to that individual particularly when they
10 go back that far. And you cannot based upon what the
11 government witnesses tell you assume on their theory when
12 Phil Kenner tells you with great specificity what he told
13 his clients, that that testimony in and of itself is
14 unbelievable because it's coming from the defendant.

15 You know, it was interesting. Mr. Nash
16 testified that he was under the impression, under the
17 impression, that based upon his conversation with Phil
18 Kenner, that his investment would be used to purchase
19 commercials on behalf of Eufora. Well, that's not Phil's
20 recollection of the conversation he had with Mr. Nash.
21 The interesting part about that is commercials were
22 actually produced. Commercials were produced. Matter of
23 fact, there is no question that the commercials were
24 produced by way of what was introduced into evidence in
25 terms of an award they received.

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1 So Eufora, much like the Hawaii land
2 development, ladies and gentlemen, was not a fraud. What
3 I mean by that, if indeed the proof before you was that
4 Phil Kenner took photographs let's say of property in
5 Hawaii out of the brochure, that Phil Kenner falsified
6 titles to land in order to convince his clients that here
7 is a Hawaii project, commit your money to a Hawaii
8 project, that was all untrue, that's fraud and that's a
9 crime. If Eufora was a fraud, if Eufora was an instance
10 where it didn't exist, the patent you heard testified to
11 that's a registered patent was falsified, that's fraud.
12 But that's not what we have here.

13 You have in evidence the transfer of membership
14 interests, C267, C266. So all of these charts, government
15 chart 10, 11, 12, 13, showing an investment going into
16 Tommy Constantine and then that money going up to Phil
17 Kenner, there is nothing fraudulent about that.

18 I have to comment. We talk about government
19 marketing. They give you the charts and lest you forget
20 what Mr. Peca looks like, they have his picture. When it
21 comes to Kenner and Constantine, they make sure they are
22 shadowy figures, something you can assume, somehow they
23 are acting behind the scene so to speak.

24 The question was asked did you consult any of
25 the witnesses and it is to say the government witnesses

Summation - Haley

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1 before you put their photograph on this chart? I believe
2 the answer was no. But you know the government, they can
3 get the photographs from, I guess, the news media. I
4 can't. It's a minor point, ladies and gentlemen. It's
5 part of what I call the government marketing as relates to
6 a criminal case.

7 All right. Let's move on to an important topic,
8 the Gaarn stock sales.

9 What does the indictment say? It was further
10 part of the scheme to defraud between December 2008 and
11 May 2009, the defendant Kenner convinced Rucchin and
12 Ranford to invest money in Eufora in exchange for
13 ownership interest in the company. Defendant directed
14 Timothy Gaarn to divert certain money for unauthorized
15 purposes including for Kenner and Constantine's personal
16 benefit.

17 Well, much like the sales by Tommy Constantine
18 to various hockey player clients by which he relinquished
19 part of his ownership interest, gave it up so the hockey
20 player clients could take the ownership interest and
21 acquire an ownership interest in Eufora, same thing
22 happened with reference to Timothy Gaarn.

23 Now, as relates to that, Timothy Gaarn testified
24 that when he acquired his ownership interest -- withdrawn.
25 Timothy Gaarn testified he never acquired an ownership

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1 interest in Eufora. He testified that no, when I became
2 involved in Eufora, I did so as a favor to Phil Kenner.
3 At that point in time the evidence seems to suggest
4 Timothy Gaarn may have needed help in terms of his
5 finances but he just does it as a favor? No. Phil Kenner
6 told you yes, I was too involved in other matters, I
7 wanted Timothy Gaarn to become involved in Eufora and in
8 return for him becoming involved in Eufora, I was giving
9 him a percentage of my ownership interest in Eufora by
10 which Timothy Gaarn now had an interest in Eufora.

11 Well, during the course of my -- during the
12 course of my cross-examination of Mr. Gaarn:

13 Question: And do or do you not have a
14 recollection that the context of asking you to do him a
15 favor, you said in substance Tim, I'm busy with a
16 multitude of other matters, I don't have time to devote as
17 managing member to the LLC for this LLC, can you come in
18 as a managing member? Was that part of the conversation
19 or not, if you recall?

20 Answer: I don't recall now.

21 You were willing to do so, is that not true,
22 sir?

23 Answer: Yes.

24 In connection with that arrangement, you were
25 also acquiring an ownership interest in that LLC, correct?

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1 I don't remember the specifics of it. He just
2 asked me to do him a favor.

3 Question: In so doing, you were also acquiring
4 not only the obligations as managing member but also
5 acquiring his ownership interest to compensate you for the
6 work you were going to do, isn't that true?

7 I don't recall. No.

8 Again, we get back to the "I don't recall." Why
9 wasn't his answer "no, absolutely not, that never
10 happened. We never talked about me acquiring an ownership
11 interest. I didn't acquire an ownership interest," rather
12 than an "I don't recall." It's that "I don't recall" that
13 they hide behind all the time.

14 Until the government asks them the question on
15 recross -- excuse me, redirect, then like other witnesses,
16 when they ask that bullet point question: Did Phil Kenner
17 tell you you were going to acquire an ownership interest
18 in Eufora, did you acquire that ownership interest, then
19 it becomes an "I don't recall," then it becomes a
20 definitive "no," because they know that's the answer the
21 government wants them to give.

22 Further with Timothy Gaarn, there was testimony
23 that Phil Kenner had loaned Tim Gaarn \$150,000 over a
24 period of time and indeed what had transpired was that
25 Phil was indeed expecting that once the hockey player

Summation - Haley

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1 clients were investing in Eufora by way of acquiring Tim
2 Gaarn's ownership interest in Eufora, that Tim Gaarn would
3 agree and did start to pay Phil Kenner back for that loan.
4 And indeed Phil testified that he made each one of his
5 hockey player clients aware that there were outstanding,
6 and I'm summarizing, outstanding obligations that Tim
7 Gaarn had to him and indeed Phil had put out a lot of
8 money in connection with pursuing Mr. Jowdy and others.
9 And by the way, this occurred at a point in time before
10 the global settlement fund was put into place.

11 So there was no misrepresentation by Phil Kenner
12 that the money that was going to Phil -- excuse me, going
13 to Tim Gaarn by which they would be acquiring the
14 ownership interest would then not be used by Tim to pay
15 Phil or anything of that nature. That was not withheld
16 and that was Phil's testimony in that respect. That
17 knowledge was not withheld from his clients.

18 The questions of Mr. Gaarn at some point, ladies
19 and gentlemen, and you will recall it's not my intention
20 to read the entire cross-examination of Mr. Gaarn but let
21 me read to you a few answers that he gave to questions
22 during cross.

23 Question: When the money from let's say Glen
24 Murray came into Eufora, LLC then ultimately went to the
25 Wachovia account, then you paid the money out, when that

Summation - Haley

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1 occurred, the transfer itself was initially into Eufora,
2 LLC, wasn't that something that CR Gentry wanted to happen
3 in order that the money that would ultimately be
4 representative and ownership interest of the contributor
5 would be tracked and reflected on the books of Eufora,
6 isn't that true?

7 Answer: I don't know.

8 Question: In a point in time you were sending
9 him that money, you were repaying him for money that he
10 had previously lent to you, isn't that true?

11 Answer: No.

12 Question: And, sir, isn't it true that the
13 reason you paid \$81,127 at that point in time is that you
14 were repaying a loan to Phil Kenner that included
15 principal and interest, isn't that true?

16 Answer: No, no, absolutely not.

17 Well, sir, well, you did, sir, isn't it true,
18 that you told the FBI that Phil Kenner had loaned you
19 money, isn't that true?

20 Answer: True.

21 Let's talk about -- by the way, let me just
22 suggest to you Kenner Exhibit 85 in evidence, it's
23 schedule K-1, 2005, reflects that Standard Ventures had an
24 ownership interest in Eufora of 5.770 percent and indeed
25 the testimony from Tim Gaarn is crystal clear he was the

Summation - Haley

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1 managing member and owner of Standard Ventures.

2 But let's talk about the government's deal to
3 Tim Gaarn. That's Government Exhibit 3500 TG 9, ladies
4 and gentlemen. You will have an opportunity to read this
5 document during your deliberations.

6 But in substance, the deal by way of the
7 testimony goes as follows:

8 Tim Gaarn is told: You have to be truthful with
9 us.

10 Tim Gaarn says: All right.

11 Tim Gaarn says: I committed no crime with Phil
12 Kenner.

13 The government says: Well, we believe you did
14 but here is the deal, you testify truthfully for us in the
15 trial of Phil Kenner and if you do so, we won't charge you
16 with the crime you say you didn't commit.

17 Ladies and gentlemen, if you can make sense of
18 that deal, I defer to your greater judgment and
19 understanding. If that is not coercive from the
20 government, I don't know how to define "coercion."

21 I'm innocent. Well, don't tell us you're
22 innocent. We know you are not innocent but that's okay,
23 as long as you testify truthfully for us, we won't charge
24 with you the crime you say you didn't commit.

25 By the way, there were hours and hours of

Summation - Haley

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1 recorded conversations between Phil Kenner and Timothy
2 Gaarn. They, the government, introduced a snippet of that
3 conversation that had the deal with Phil giving him advice
4 how he should file his taxes in view of these transactions
5 and the loans made between the two of them. Phil didn't
6 know he was being recorded and yet within that context
7 where Timothy Gaarn had a full and fair opportunity to
8 say: Hey, Phil, I've got to talk to you. You know that
9 scheme we put together in connection with the theft of the
10 monies from your hockey player clients, I'm concerned. It
11 didn't become part of the conversation, ladies and
12 gentlemen, between the surreptitiously recorded
13 conversation between Phil Kenner and Tim Gaarn because
14 there was no criminal activity as between the two of them.

15 You know, you may recall Timothy Gaarn on the
16 witness stand. A litany of "I don't recall," except when
17 asked by a government prosecutor to recall damages. But
18 did you pick up when the government played the recorded
19 conversation involving Tim Gaarn and Tommy Constantine?
20 Though it was of relatively short duration, Timothy Gaarn
21 was engaged, he was inquisitive. He wanted to know what
22 was happening about the company. And you may recall I
23 asked the witness: Is there more than one Timothy Gaarn
24 that is associated with Eufora, because his lack of memory
25 on the witness stand and what you see in that recorded

Summation - Haley

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1 conversation suggests that he was rather astute,
2 inquisitive, not the fellow that says I just did what Phil
3 Kenner told me to do. And how often did we hear that?
4 Kenner Exhibit 8, which is the e-mail, and I'm not going
5 to go to the screen, ladies and gentlemen, you will have
6 an opportunity to look at all these, which is the e-mail
7 reflecting the transfers and the individuals Rucchin,
8 Murray, Rucchin, Murray, Ranford, DeVries, Murray
9 purchased Tim Gaarn's stock in a return obtained their
10 ownership interest in Eufora. That's Kenner Exhibit 80.
11 It exists.

12 What did he say? Well, I only put this here
13 because Phil Kenner told me I should put this in the
14 e-mail. He denied the loans. Yet Kenner Exhibit 82 in
15 evidence, the loans between Phil Kenner to himself
16 reflects the loan history, page by page by page. He
17 denied that at any point in time he started to loan Phil
18 Kenner money out of the proceeds of the investors' money.
19 Again, he was relinquishing his stock. But Kenner Exhibit
20 83, as an example, has a \$2,000 payment to Tim Gaarn with
21 a notation "Kenner loan repay."

22 This was introduced into evidence, Kenner
23 Exhibit 228. That is the spread sheet created by CR
24 Gentry that is introduced into evidence not for the truth
25 of the matter therein contained, the judge gave you that

Summation - Haley

5856

1 instruction, but only as relates to Phil Kenner's state of
2 mind. His understanding as to what was happening with his
3 clients' Eufora investments. And you will see in this
4 document the Steve Rucchin investment. You will see the
5 William Ranford investment. Actually, what you will not
6 see is the February 9, 2005 investment by Mr. Ranford.
7 That is not reflected on this document when this document
8 was created at that point in time. Frankly, I thought the
9 government would point that out to you but I will point it
10 out to you. But this document clearly says this should be
11 in large letters reviewed by Tim Gaarn, Phil Kenner, Tommy
12 Constantine, et al., to ensure it is correct. I did not
13 have complete records on this and it must be thoroughly
14 reviewed again.

15 Tim Gaarn told you he knew nothing of a
16 consulting agreement by which he was paid from Little Isle
17 IV funds. That consulting agreement is Kenner Exhibit
18 223.

19 And I want to read to you, ladies and gentlemen,
20 so you have a full understanding that there was a
21 concerted effort including -- which included Phil Kenner
22 to see to it that the books and records of Eufora did
23 reflect his clients' ownership interest in Eufora in the
24 first instance when they were purchasing privately held
25 stock owned by Tommy Constantine and in the second

Summation - Haley

5857

1 instance purchasing privately held stock owned by Tim
2 Gaarn.

3 And Phil testified as follows, he was talking
4 about the tape that's in evidence, the tape recorded
5 conversation between he and Tommy Constantine and I'm
6 going to read that immediately but as relates to Phil's
7 involvement in trying to see to it that the books and
8 records accurately reflected his client's ownership
9 interest, Phil said: So I do recall making a copy from my
10 iPhone to a disk then sending it by mail to Mr. Stolper.
11 And I think at some point either Mr. Stolper or myself
12 told Mr. Kaiser, Mr. Berard, Mr. Gentry, Mr. Gaarn and the
13 others that were involved, Mr. Hatzimemos, the others that
14 were involved in the investigation and I let them know
15 that I sent a copy to Mr. Stolper.

16 What Phil was doing, ladies and gentlemen, is
17 with the assistance of Tim Gaarn, CR Gentry, Mr. Stolper
18 and others engaged in an effort to see to it that the
19 books and records of Eufora were complete, accurate in
20 order that they might reflect his clients' ownership
21 interest.

22 Exhibits 224, 225, 226 and 227 reflect the
23 documents by which the ownership interests of various
24 individuals and the means by which Phil Kenner's clients
25 acquired their ownership interest, became part and parcel

Summation - Haley

5858

1 of the books and records of Eufora. These documents,
2 ladies and gentlemen, the government -- these documents
3 were backdated because they reflected transactions that
4 occurred years prior that had not been recorded on the
5 books and records so they backdated the documents to
6 reflect the day the interest occurred and was acquired in
7 order that every one of Phil Kenner's clients would have a
8 legal claim should Eufora ultimately be sold privately --
9 publicly, excuse me, in order to recoup their investments.

10 (Continued on the next page.)
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Summation - Haley

5859

1 MR. HALEY (Continuing): And, ladies and
2 gentlemen, that explains the charts that show the money
3 that goes from, let's say, Glenn Murray to Eufora to Gaarn
4 and then to Kenner.

5 Those monies were indeed paid out as reflected
6 in these exhibits from the government's chart. So there
7 was nothing illegal or it was not part of an artifice or a
8 scheme to defraud anyone. And you have those exhibits
9 that the government has referred to.

10 Let's get to the Home Depot tape. You will have
11 a right to review that tape, but it is Tommy Constantine
12 talking. And you heard, frankly, from Mr. D'Ambrosio,
13 that Tommy Constantine has a predilection or propensity,
14 when he speaks and is in disagreement with someone, to not
15 allow you to get a word in edgewise. He just talks and
16 talks and talks.

17 As a matter of fact, Mr. D'Ambrosio said he was
18 talking with the godfather of his child and he was
19 essentially screaming at him so such that that person
20 couldn't get a word in edgewise.

21 Well, it is a long, 27-minute tape, ladies and
22 gentlemen. I'm not going to read all of this, but let me
23 read some of the more salient portions.

24 *Constantine: So I know you're not gonna believe*
25 *anything I tell you but I'm going to try anyway.*

Summation - Haley

5860

1 Mr. Phil Kenner says: *Okay. And then the*
2 *deluge of accusations by Tommy Constantine.*

3 *And within the deluge, Tommy throws out:*

4 *You're in deep f'n shit if this stuff happens.*
5 *You are in deep shit. The f'n FBI is all over this f'n*
6 *thing and they are not asking about anybody else and I'm*
7 *trying to stop you from burning down your life.*

8 *Whatever that means. That's Tommy Constantine*
9 *talking.*

10 *And he's talking because he is upset that Phil*
11 *Kenner, in an effort to protect his clients' interests,*
12 *his hockey player clients' interests, is part and parcel*
13 *of that effort through Stolper and Gentry and Gaarn to*
14 *make sure the books and records are correct.*

15 *And the famous -- it just doesn't stop. I'm*
16 *worried about, frankly, I'm worried about you and a couple*
17 *of other people. And I know why they are playing so*
18 *hardball with Tim, because he has liability, too.*

19 *What do you think is gonna happen when \$700,000*
20 *shows up, going from the players that really bought it the*
21 *first time, to the bank account, back to Tim Gaarn, to*
22 *Eufora's bank account -- back to Tim Gaarn's account to*
23 *your account. Like this is not going to look good, right.*

24 *And then he just continues. Phil lets him talk.*

25 *Well, what does Phil Kenner do with this tape*

Summation - Haley

5861

1 recording wherein Tommy Constantine is saying what Tommy
2 Constantine wants to say? And that's really his modus
3 operandi: When you fight or when are in a dispute, accuse
4 others of misdeeds.

5 What does Phil do with this? Does he destroy
6 it? Does his cell phone end up in the Great South Bay?
7 No. He sends the recording to Michael Stolper, wherein
8 Ranford and Rucchin are part of that group and they have
9 every opportunity to listen to that recording.

10 Phil had no fear about what Tommy Constantine
11 said in that recording because Phil Kenner had committed
12 no fraud and no crime.

13 Kenner Exhibit, 237 introduced into evidence by
14 us, the text conversation between Mike Stolper and Phil
15 Kenner, reads as follows. And this is Phil speaking to
16 Stolper.

17 *Tommy -- meaning Tommy Constantine -- has the*
18 *Kenner gave Gaarn stock there is a legal transfer issue on*
19 *the table. He's threatening with law enforcement to go*
20 *after us. He just threatened law enforcement involvement*
21 *to settle the issue with the Kenner/Gaarn transfer.*

22 Michael Stolper replies: *Predictable.*

23 Michael Stolper replies: *Hopefully, recorded.*

24 And it was recorded. And that's the recording
25 you heard.

Summation - Haley

5862

1 That is not consciousness of guilt.

2 Consciousness of guilt is when you hide something because
3 you know there's truth to that accusation. Not only was
4 it sent to Stolper, preserved by Stolper, but is here for
5 you to hear as part of this trial. Through who? Not by
6 some surreptitious or undercover operation by the federal
7 government but because Phil Kenner put it out there for
8 all to hear long before he was ever charged in this case
9 with committing federal crimes.

10 Once again, ladies and gentlemen, you will have
11 the opportunity, should there be any doubt, to have Phil
12 Kenner's testimony read back to you as to what he told
13 both Ranford and Rucchin. There was disclosure. He let
14 them know they were purchasing Gaarn's and he would in
15 turn be obtaining -- I'm paraphrasing -- the monies
16 through those sales from Gaarn in order to recoup
17 expenses.

18 Mr. Ranford and Rucchin ostensibly don't recall
19 that. But as I said, please, if you have any doubt, ask
20 for Mr. Rucchin's testimony in particular to be read back
21 as to the number of times he said *I don't recall*.

22 Okay. Ladies and gentlemen, because of the
23 multiple counts in this indictment, nine separate counts,
24 four alleged schemes to defraud, that necessitates from my
25 perspective the need to, not retry this case over the last

Summation - Haley

5863

1 coming on nine weeks now, but at least to highlight for
2 you elements of the record that we feel are significant.

3 And I indeed missed any number of aspects of the
4 record but let me please continue. And I know you will
5 bear with me. You have given me your patience up to this
6 point of time and I ask for that last measure of patience.

7 Nick Privitello. Phil Kenner is charged in
8 paragraph 14 of this indictment:

9 *It was further part of the scheme to defraud*
10 *that between November 2009 and December 2009, the*
11 *defendants Kenner and Constantine convinced Privitello to*
12 *invest money in Eufora in exchange for an ownership*
13 *interest in the company.*

14 *The defendant Constantine then unlawfully*
15 *diverted certain money for unauthorized purposes,*
16 *including for his personal benefit, and disavowed*
17 *Privitello's ownership interest in Eufora.*

18 What proof is there in this record that Phil
19 Kenner had any role whatsoever in the Privitello stock
20 transfer? Why is he named as a defendant, codefendant in
21 that stock transfer?

22 You are going to hear the judge when he charges
23 you: you cannot base a verdict, conviction of any person,
24 on something called guilt by association. If you make a
25 determination, and that is a determination that will be

Summation - Haley

5864

1 left up to you, that there had been some misconduct, some
2 misdeed that may or not rise to a criminal level, that is
3 your determination as relates to the Privitello stock
4 sales, or what happened not to turn out to be the stock
5 sale because the stock was never actually transferred,
6 Phil Kenner had no role in that whatsoever.

7 And we know that because when Nick Privitello
8 had an opportunity to bring a civil lawsuit for precisely
9 that event and the circumstances underlying that event,
10 Phil Kenner was not named as a defendant because Nick
11 Privitello knew Phil Kenner had absolutely nothing to do
12 with that transaction.

13 Yet, the government -- remember that word *power*,
14 the government, utilizing its power in terms of crafting
15 the charges that are presented to a grand jury and the
16 evidence that is presented to a grand jury for indictment,
17 the grand jury then returns that part of the indictment
18 which accuses Phil Kenner of being a coconspirator in Nick
19 Privitello, in the events involving Nick Privitello. So
20 let's put Privitello away.

21 Led Better, Sag Harbor. Now we get back to John
22 Kaiser. John Kaiser, as I said on Thursday, apparently
23 the government views him as a central, critical witness to
24 their case. He was mentioned repeatedly as a victim of
25 Phil Kenner. Phil Kenner told you that of all the people,

Summation - Haley

5865

1 John Kaiser was fully paid back \$1.175 million for his
2 investments. He claimed, Phil testified, that bank
3 records support that repayment. And there was no
4 cross-examination by the government that that was not the
5 case.

6 Exhibit 703 is the Led Better operating
7 agreement. This was the document that was introduced into
8 evidence when Mr. Betesh testified, the attorney who
9 handled the closing. And this document, he told you, was
10 present at the closing for all to see. It is a two-page
11 document, and actually brought out in the government's
12 direct testimony. And it reflects that equity and
13 ownership interest in Led Better: Phil Kenner, 25
14 percent. Brian Berard, 25 percent. John Kaiser, 25
15 percent. Vincent Tesoriero. 25 percent.

16 Mr. Betesh was asked: *Well, was John Kaiser*
17 *present at that closing?* And he said: *I don't recall but*
18 *I see a copy of his ID in the file.* So how he acquired a
19 copy of John Kaiser's ID if John Kaiser wasn't present,
20 well, who knows.

21 But that issue got resolved later because John
22 Kaiser said: *I was present at that closing.* Keep in
23 mind, we will get to that in a moment, but let me read you
24 this question asked by Mr. Miskiewicz and the answer given
25 apply John Kaiser.

Summation - Haley

5866

1 *Showing you page two of Government Exhibit 703.*

2 *At the time of the closing on the Sag Harbor Led Better*
3 *property, did you see what I'm showing you here on the*
4 *screen?*

5 *Answer: No, I did not.*

6 Well, he was present at the closing. Mr. Betesh
7 identified the documents that were present at the closing.
8 It wasn't a stack like you saw that Mr. Sydor had from the
9 Lehman closing. And this is just a two-page document. I
10 then asked Kaiser.

11 *Question: Sir, the closing of the North Point*
12 *and Led Better, this was something of significant event*
13 *for you.*

14 *Answer: Yes.*

15 *And did you have an attorney there? Is that*
16 *correct?*

17 *Answer: I believe so.*

18 Do you remember how many people were seated at
19 the closing? Was it an oval table? You were seated next
20 to your attorney and Phil Kenner was seated next to his
21 attorney? And papers were then presented for signature
22 and things of that nature? Do you recall that?

23 No, I don't remember what table we were sitting
24 at.

25 *Question: But you were there. Correct? And*

Summation - Haley

5867

1 *you were in the room, is that true?*

2 *I was there. I don't believe Mr. Kenner was.*

3 Well, why must John Kaiser tell you that he
4 never saw this document at the closing? Which reflects
5 the various ownership interests of Berard, Kaiser, and
6 Tesoriero? Because the government alleges, in paragraph
7 22 of the indictment:

8 *It was part of the scheme to defraud that in or*
9 *about October 2006 the defendant Kenner created Led Better*
10 *Development Company, Led Better, a Delaware limited*
11 *liability company, for the purpose of purchasing the Sag*
12 *Harbor property. Thereafter, Kenner created an operating*
13 *agreement stating that Kenner, Berard, Jake Kaiser and*
14 *Vincent Tesoriero were each 25 percent owners of Led*
15 *Better. Kenner did not disclose the operating agreement*
16 *to Berard and John Kaiser prior to or at the time of the*
17 *purchase of the Sag Harbor property.*

18 So they had to take the allegation in the
19 indictment and make it fit its proof. Really, ladies and
20 gentlemen, here it is, 703. Kaiser was there. He says:
21 *Well, I never took a look at this. Nonsense. He was*
22 aware. He was aware of the distribution at that point in
23 time.

24 You know, the knowledge that Brian Berard had
25 his ownership interest in Sag Harbor property, it was

Summation - Haley

5868

1 reflected in the email, Kenner Exhibit 221, between Brian
2 Berard and Phil Kenner.

3 *What's up? How's your weekend? What's the town*
4 *called where our property is out in Eastern Long Island?*

5 Berard says that Phil Kenner told him he would
6 have a 50 percent interest in the property for his
7 investment in Sag Harbor.

8 Interestingly enough, when Kaiser and others get
9 together to change the Led Better development Company LLC
10 operating agreement, Kenner Exhibit 33, guess how the
11 ownership interest plays out? John Kaiser, 50 percent.
12 Brian Berard, 25 percent. And Vincent Tesoriero, 25
13 percent. That's exactly what Phil Kenner said I told
14 Brian Berard: You will be getting 25 percent. Not 50
15 percent.

16 And, indeed, when Kaiser creates the revised
17 operating agreement, it doesn't say Berard 50 percent. It
18 says Kaiser 50 and Berard 25: consistent with Phil
19 Kenner's testimony.

20 You know, you may have wondered why the only
21 witness called by the defense, other than having Phil
22 testify, was Vincent Tesoriero. Because Vincent Tesoriero
23 corroborated something that Phil Kenner testified to. It
24 is part and parcel of this.

25 He told you that John Kaiser told him that he

Summation - Haley

5869

1 wanted Chris Manfredi out of the North Point Property.

2 And recall what Phil said? Phil said when the Lehman loan
3 closed, Kaiser made a condition to sign off on it: *Hey,*
4 *listen. You have to help me get Chris Manfredi out of*
5 *North Point Properties.*

6 And that is what then transpired. A loan came
7 out of Peca's account to help that take place. Kaiser
8 received the loan as the monies from Brian Berard. Eleven
9 days later, that loan was paid back by John Kaiser to the
10 Ula Makika account, then became part of the pool of money
11 for purposes of Ula Makika.

12 Well, John Kaiser actually didn't pay back the
13 full 395. He paid back only 380. So if there is someone
14 who really has at this point in time, based upon this
15 proof, not really made the investments whole, it is John
16 Kaiser. Where is that 15K that was supposed to come back?
17 Phil didn't sue John Kaiser for the 15K. Perhaps he
18 should have. But is that what this case is all about.

19 The chart number 8, Sag Harbor government chart
20 number 8, shows the Kaiser 380 coming back to Ula Makika
21 and then it does show thereafter \$200,000 being paid out
22 of the Ula Makika account to Phil Kenner. Bank records
23 are accurate. We never disputed the accuracy of it.

24 But that \$200,000, ladies and gentlemen, was due
25 Phil Kenner under the environmental indemnity agreement.

Summation - Haley

5870

1 It is in evidence. Read that document. And because Phil
2 had put on personal guarantees in order that Lehman would
3 give the loan, there were environmental issues.

4 Lehman Brothers did not want to be on the hook
5 for those environmental, and Phil Kenner through that
6 agreement -- and I know it is complicated -- said I will
7 assume personal liability for any issues as relates to
8 environmental requirements or damages. But in return for
9 that, in return for my putting myself at risk, I'm
10 entitled to be compensated. And that is what the
11 environmental indemnity agreement is. And that \$200,000
12 is directly traceable to the environmental indemnity
13 agreement. Led Better Sag Harbor, ladies and gentlemen,
14 was not part and parcel of a scheme or artifice to
15 defraud.

16 I hope I can deal with Global Settlement fund,
17 ladies and gentlemen, in relatively short summary fashion.
18 The email that was created by Phil, we don't deny it, and
19 the acknowledgement and consent of the various individuals
20 is a matter of record. But from there and from that point
21 on there is a dispute.

22 There is a dispute between Phil Kenner and Tommy
23 Constantine. That is where Phil Kenner at some point in
24 time was of the view that whatever the details set forth
25 in that that acknowledgment and consent letter is

Summation - Haley

5871

1 concerned -- I used the word *primary*, Phil corrected me
2 and said *major* purpose. The major purpose of the Global
3 Settlement Fund was to pursue lawsuits against Ken Jowdy.

4 And there came a point in time where Phil
5 Kenner, when he sought additional monies for that purpose
6 and other litigation purposes -- including, by the way,
7 Kristie Myrick. That was testified by more than one
8 person as being something that was discussed when the
9 Global Settlement Fund was put together that moneys could
10 be use with reference to Kristie Myrick. You heard Phil's
11 testimony. She had books and records that belonged to the
12 Little Isle IV endeavor, the Hawaiian project. He was
13 suing her to make sure that books and records that they
14 were entitled to obtain, to get back, were acquired
15 through that litigation.

16 So what does Phil Kenner do? Does he keep it a
17 secret when he is of the view as to whether or not Tommy
18 Constantine misused funds? He writes this email, dated
19 April 19, 2011.

20 As you are all aware, Constantine has
21 misappropriated the lion's share of the GSF, Global
22 Settlement Fund, that would have been, have been a great
23 assistance in the Mexico pursuit of Jowdy, for his own
24 benefit. He left me with very few financial options.
25 While I'm trying not to quit our legal pursuit.

Summation - Haley

5872

1 We know Government Exhibit 767, which is the Ron
2 Richards spreadsheet in connection with the use of the GSF
3 fund. We have Phil's commentary on the side of it,
4 instances where, and he testified what he thought funds
5 were utilized by Tommy Constantine not in his view
6 consistent with the agreement that we reached with
7 reference to the Global Settlement Fund. And this
8 document was provided through one or more of his hockey
9 player clients in order that they might have an
10 understanding as to what was happening to the Global
11 Settlement Fund.

12 You know, based upon the testimony, that once
13 the Global Settlement Fund was established, the monies
14 came in, the person who had exclusive and complete control
15 over those monies was Tommy Constantine. Phil Kenner was
16 not directing where those monies went and when those
17 monies went. That was Tommy Constantine. Actually, he
18 shared that Global Settlement Fund sheet with Mr. McKee.
19 And frankly, I can't recall the other hockey peculiar
20 client he shared it with.

21 Quickly, ladies and gentlemen, Discovery Harbor.
22 Actually, we talked about Discovery Harbor. All I'm going
23 to say is this: That discovery harbor was characterized
24 in the Lehman closing papers as what were known as the
25 home site lots. The home sites lots were referenced in

Summation - Haley

5873

1 the large closing package that Darryl Sydor received.

2 Remember that big brown box? Contained within
3 those hundreds, if not thousands, of pages was reference
4 to the home site lots, Discovery Site lots. It was not
5 hidden from anyone. It was indeed part and parcel of the
6 Lehman closing. There was no intent to defraud there.

7 I want to just comment briefly on Phil Kenner's
8 testimony. You know, when you deliberate, it doesn't have
9 to be a situation where there are those for Phil Kenner
10 and those against Phil Kenner because, as you will hear,
11 it is whether the government has proven this case beyond a
12 reasonable doubt. You may or may not like Phil's
13 appearance, his dress, whether his hair is too long or
14 whether it is too short. Is not a personality contest.
15 And, by the way, I'm not commenting one way or another
16 because it is the content of what he says, not whether or
17 not there is some personal connection one way or another.
18 And I think we all know that.

19 You know, there may be, and perhaps are to this
20 date still disputes between Phil Kenner and hockey play
21 clients. But we saw how those disputes can and do get
22 addressed. They can and do get addressed by way of civil
23 litigation. The standard advisers agreement provided for
24 that.

25 Owen Nolan took advantage of that. Obtained an

Summation - Haley

5874

1 arbitration award. Whether the arbitration award was
2 correct in that regard is not for your determination.
3 That has no relevance or materiality as relates to proof
4 beyond a reasonable doubt, which is the proof that you are
5 obligated to follow.

6 And, you know, if each one of these hockey
7 player clients really in their heart and minds knew or
8 believed that Phil Kenner defrauded them, they would have
9 and could have commenced civil litigation to right that
10 wrong.

11 And that standard advisor's agreement, ladies
12 and gentlemen, provided for the award of attorneys fees if
13 you prevail. So as long as you are right on the issue,
14 not only do you obtain a judgment but it doesn't cost you
15 a penny in terms of attorneys fees. The prevailing party
16 gets attorneys fees.

17 They never, other than Owen Nolan, who had a
18 dispute with Phil Kenner about whether he was aware that
19 money was going from Hawaii to Jowdy, he is the only one
20 that commenced that civil suit. Each one of them had an
21 opportunity to do that if indeed they believed that was
22 the case. They did not do so. But they were brought into
23 federal court by the government to reveal that dispute.

24 Let me also say another aspect of Phil's
25 testimony. He was asked a question by Mr. Miskiewicz as

Summation - Haley

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1 relates to the involvement of Louis Freeh, the former
2 director of the Federal Bureau of Investigation. And the
3 question on cross-examination, in effect, was: Well, sir,
4 are you alleging that Louis Freeh, the former director of
5 the FBI and I believe who had pursued the impeachment of
6 Richard Nixon, is engaged in some sort of conspiracy? And
7 you would expect Phil at that point in time to blurt out:
8 Yes, I am. But, you know, that wasn't his answer. His
9 answer was: *I'm only reporting the facts as I know them*
10 *to be, and that includes.*

11 What facts do you know them to be? Well, of
12 course we have Kenner Exhibit 43, where John Kaiser
13 confirms conversations with Ken Jowdy regarding the loan
14 from Hawaii to Mexico.

15 We have Kevin Exhibit 214, the revolving line of
16 credit signed by Ken Jowdy and witnessed by Robert Gaudet.

17 We have, I'm not going to say disturbingly but
18 we have of course Kenner Exhibit 229, where, when Phil
19 Kenner and Ken Jowdy were still on speaking terms, Ken
20 Jowdy is down in Mexico with others, and at this point in
21 time talking about how John Banke is a really good
22 friend -- excuse me, not really, good buddy in the FBI.
23 We can't have a more solidly guy. He has been with the
24 Secret Service and then with the FBI more than 20 years,
25 and it goes on and on and on. That is the same John Banke

Summation - Haley

5876

1 who is now the Director of Security for Diamanté Cabo San
2 Lucas.

3 We have subpoenas whereby Phil Kenner was
4 originally subpoenaed to testify. He testified as to the
5 nature of his expected testimony. He was going to be
6 brought in as relates to investigation of Roger Clemens,
7 Ken Jowdy, things of that nature. Ten days after that
8 subpoena was issued, it was rescinded and he is told don't
9 bother to show up.

10 And of course we have now John Kaiser, who is
11 the director of buildings for Diamanté San Lucas. And we
12 have Brian Berard, who is the sales director.

13 Ladies and gentlemen, if there is the slightest
14 chance that this is true, if there is the slightest chance
15 that Ken Jowdy, through his connections with the FBI
16 having employed John Banke, or through his retention of
17 the former director of the FBI as his lawyer, that this
18 investigation had an objective at its very start, and that
19 is to conclude that Phil Kenner is deserving of
20 prosecution and then making the facts fit that; if there
21 is the slightest chance that that is the case, this case
22 has built-in reasonable doubt because the process is
23 corrupt.

24 And sometimes, ladies and gentlemen, the process
25 is more important than the outcome. We cannot have law

Summation - Haley

5877

1 enforcement do anything except look at facts objectively
2 and pursue an investigation and allow those facts to take
3 them where it leads.

4 Okay. Believe it or not, I am coming close to
5 concluding. The Judge will be giving you the law. And I
6 expect you will hear things from Judge Bianco as relates
7 to the law: burden of proof, proof beyond a reasonable
8 doubt.

9 You may hear Judge Bianco tell you that in a
10 criminal case the burden is at all times upon the
11 government to prove guilt beyond a reasonable doubt. I
12 expect that you will hear that this burden never shifts to
13 the defendants, which means that it is always the
14 government's burden to prove each of the elements of the
15 crimes charged beyond a reasonable doubt.

16 I expect you will hear from Judge Bianco that
17 your verdict as to each defendant must be determined
18 separately with respect to him, solely on the evidence, or
19 lack of evidence, presented against him, without regard to
20 the guilt or innocence of the other defendant on trial or
21 anyone else.

22 I expect you may hear from the Judge the fact
23 that you return a verdict of guilty or not guilty to one
24 defendant should not in any way affect your verdict
25 regarding the other defendant.

Summation - Haley

5878

1 The nonprosecution agreement with Tim Gaarn,
2 assuming you can make sense of it, you may hear Judge
3 Bianco say: However, the testimony of a witness who has
4 been promised that he will not be prosecuted should be
5 examined by you with greater care than the testimony of an
6 ordinary witness.

7 Again, because there are multiple counts, I
8 expect that you will hear that you must as a matter of law
9 consider each count of the indictment and each defendant's
10 involvement in that count separately, like Privitello, and
11 you must return a separate verdict on each defendant for
12 each count in which he is charged.

13 Various elements will be defined to you, ladies
14 and gentlemen, but the most important element in this case
15 is the second element: participation in a scheme with
16 intent. And I expect you will hear Judge Bianco tell you
17 that intent to defraud means to act knowingly and with a
18 specific intent to deceive for the purpose of causing some
19 financial or property loss to another.

20 And I would ask you to pay close attention to
21 what I expect you will hear from Judge Bianco in this
22 respect. Since an essential element of the crime charged
23 is intent to defraud, it follows that good faith on the
24 part of a defendant you are considering is a complete
25 defense to a charge of wire fraud. Each defendant,

Summation - Haley

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1 however, has no burden to establish a defense of good
2 faith. The burden is on the government to prove
3 fraudulent intent and the consequent lack of good faith
4 beyond a reasonable doubt.

5 Under the wire fraud statute, even false
6 representations or statements or omissions of a material
7 fact do not amount to fraud unless done with fraudulent
8 intent.

9 Actually, good faith. You will hear him define
10 *good faith* in another part of the charge and I won't read
11 that to you.

12 Well, I will leave the judge's charge to be
13 delivered to you by Judge Bianco. Let me simply say this.

14 Phil Kenner is a pretty poor coconspirator, as
15 you know now. We know, we saw what he perceived as
16 wrongdoing or misuse of GSF funds by Tommy Constantine;
17 published it in an email to his clients. We know he
18 worked with Stolper. When they believed the books and
19 records -- as a matter of fact, what was the phrase used?
20 We needed to clean up the books and records. Was that the
21 testimony from one of the government's witnesses? We
22 know. And by the way, again, that resulted in the Stolper
23 lawsuit, the disputes between him and Tommy Constantine.
24 Tommy Constantine's accusation in the paper.

25 We know that Phil Kenner assisted his clients in

Summation - Haley

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1 filing adversary proceedings in bankruptcy court when
2 Tommy Constantine filed for bankruptcy, and either by
3 omission or design, did not identify Phil Kenner's hockey
4 player clients as having a claim against Eufora or a claim
5 against him.

6 When Phil Kenner did that, bring to light what
7 he perceived as misuse of GSF funds, commenced a lawsuit
8 through Stolper, helped his clients file adverse
9 proceedings claims in Tommy Constantine's bankruptcy
10 proceeding, was he acting in bad faith?

11 This dispute, to the extent that there is a real
12 dispute between Phil Kenner and clients, belongs where it
13 started and where it should end, if at all, and that is in
14 civil court.

15 Twelve underlying lawsuits were filed.
16 Actually, not again as relates to claims by Phil Kenner's
17 client against him but as relates to Phil Kenner pursuing
18 legal action on behalf of Little Isle IV, where client
19 were invested, in order to obtain payment on the loan
20 Little Isle IV gave to Ken Jowdy.

21 And it has been the arrest and prosecution of
22 Phil Kenner that has interrupted, if not at this moment
23 stopped, that effort to see to it that his clients are
24 made whole.

25 You know, the indictment. The indictment. That

Summation - Haley

5881

1 is the house the government wants you the buy, ladies and
2 gentlemen. But behind the wall of that house, the words
3 on the pages, the timbers of that house are riddled with
4 reasonable doubt. And the foundation is cracked because
5 they are trying to turn into a crime, private stock sales
6 by Tommy Constantine. They trying to turn into a crime,
7 private stock sales by Tim Gaarn.

8 You know, you buy a house. It is a very
9 significant decision you make in your life. And you buy
10 it, you make the right decision or the wrong decision, and
11 you live with it.

12 And I suggest to you that when you decide
13 whether or not the government has proven the guilt beyond
14 a reasonable doubt of a fellow citizen, you ought to
15 approach it with the same seriousness, if not more, than
16 the decision you make when you buy a house.

17 There are nine counts in this indictment.
18 Oftentimes the government -- it is certainly within their
19 power to do so -- will charge a defendant with multiple
20 counts in the hope that the jury when they deliberate will
21 reach a compromise verdict.

22 *Well, let's be fair. We will convict Phil*
23 *Kenner of some counts. We will find him not guilty of*
24 *other counts. Isn't that that a fair determination?*

25 The answer is no. If the government proves each

Summation - Haley

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1 and every element of each and every one of those defenses
2 beyond a reasonable doubt, it is your obligation to find
3 Phil Kenner guilty of all those counts.

4 If, however, they have not proven beyond a
5 reasonable doubt each and every element of the offense as
6 charged in the indictment, it is your obligation to find
7 Phil Kenner not guilty nine times.

8 That requires a lot of energy. It requires a
9 lot of effort. But that is your obligation.

10 This is my last opportunity to address you. And
11 our paths may never cross again. And when I sit down, the
12 government will have the opportunity, as is their right,
13 to deliver a rebuttal summation. They are given that
14 right because it is their burden to prove this case beyond
15 a reasonable doubt.

16 I won't have the opportunity to answer anything
17 the government may say in its rebuttal summation. And
18 that is the way it should be. But if you are going to
19 approach this in the serious manner in which you should
20 approach this, I would ask you to have a healthy
21 skepticism for whatever the government says in their
22 rebuttal.

23 If they have earned your trust, well. And that
24 healthy skepticism, ladies and gentlemen, may be served
25 by, as you listen to them: *Well, what would Haley say?*

Summation - Haley

5883

1 Or Mr. *Healey* say.

2 Okay. Thanks for listening to me.

3 THE COURT: Members of the jury, we will take
4 the morning break. Don't discuss the case.

5 We will reconvene in 20 minutes.

6 (Recess taken at 11:30 a.m.)

7 (Continued on the following page.)

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SUMMATION - LaRUSSO

5884

1 MR. LaRUSSO: Are we going to 1:00?

2 THE COURT: Yes. Let's bring in the jury.

3 THE CLERK: All rise.

4 (Whereupon the jury enters the courtroom at 12:00
5 p.m.)

6 THE COURT: Okay. Members of the jury, you will now
7 hear the summation for Mr. Constantine given by Mr. LaRusso.

8 Go ahead, Mr. LaRusso.

9 MR. LaRUSSO: Thank you, Your Honor.

10 If it please the court, good morning, ladies and
11 gentlemen. You're all looking at me. You're going
12 (gesture)...

13 There's a stack of documents with various files.
14 Having seen the file for almost eight weeks, I don't think
15 I've been without all the documents and notes to ask questions
16 of witnesses. But sorry to disappoint you, I'm going to be
17 using just this binder here and making my arguments from it.

18 However, we're going to try and do a PowerPoint
19 presentation to be able to move the argument along. The
20 discussion that we're going that we'll have over the next
21 couple of hours, we're going to try to PowerPoint. Hopefully,
22 you'll be able to digest. You know what I'm saying? And at
23 the same time, look at the documents. And maybe through both
24 the oral presentation and through the document examination,
25 you'll be able to recall some of the testimony that occurred

1 during the trial.

2 When we first met, during our opening statements --
3 I can't believe it's more than two months ago -- I told you a
4 few things about what we believed was going to happen during
5 this trial. I also told you that while the government would
6 be painting my client with broad strokes, flawed allegations,
7 generalities, those are the words that I used, and less than
8 all the facts, we, on the other hand, would be presenting
9 specific hard evidence that would prove that Mr. Constantine
10 is innocent.

11 As you know, it's not even our burden to prove that
12 Mr. Constantine is innocent. It's the government's burden to
13 prove that he's guilty beyond a reasonable doubt. And that,
14 ladies and gentlemen, has simply not been done.

15 Before we discuss that, I would like, for the sake
16 of convenience, just to kind of reiterate for you a few of the
17 specific things that I talked to you at the beginning of this
18 trial, and illustrate to you what, in fact, has occurred
19 thought the trial.

20 First, I told you that Mr. Constantine was here
21 because he was trying to help two business associates sort out
22 their differences; and that he ultimately was attacked by both
23 of them, among others. Remember I told you that old saying,
24 no good deed goes unpunished? I mentioned how various
25 individuals involved in this mess switched from one team to

SUMMATION - LaRUSSO

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1 another. And yet, I think we can all agree that this was made
2 perfectly clear during the trial itself.

3 So first it was Kenner, Constantine, Kaiser, Berard,
4 Richards, and the NHL players, against Jowdy. I'm sure you
5 remember that. 2009, June, Ron Richards filed the complaint.
6 So that was the first group.

7 Then what happened? We saw that it was then Kenner,
8 Kaiser, his pals, including Mr. Privitello, Berard, Gentry,
9 Gaarn, Stolper, and the NHL players, and even Mr. Kaiser's
10 mother were against Mr. Constantine.

11 If you recall the events of 2010, including the
12 secret negotiations by that group to buy the Brent Nerguzian
13 loan and take over the company from Mr. Constantine; the
14 shareholders meeting and ultimately the suit that was filed by
15 Mr. Stolper in October of 2010.

16 And then third, of course, now it's Kaiser, it's
17 Berard, it's Gentry, it's Gaarn, it's Privitello, Jowdy, and
18 Agent Galioto against Mr. Constantine and Mr. Kenner. I think
19 the testimony over those last eight weeks showed just that.

20 If you remember correctly, I think I actually
21 referred to it as a fiasco. I also suggested to you, ladies
22 and gentlemen, that the government was going to spend an
23 inordinate amount of time and energy showing you how my client
24 spent his money. And notwithstanding the fact that we really
25 never disputed how he spent his money, there's no issue on

SUMMATION - LaRUSSO

5887

1 that, we all had to sit here for six weeks and listen to the
2 testimony of Mr. Constantine's former attorneys, disgruntled
3 racing team mechanics explaining just that, how he spent his
4 money.

5 We also heard an awful lot about helicopters, race
6 cars and Playboy models. And while that all may sound very
7 interesting, these things really had nothing to do with this
8 case.

9 What we didn't hear or see from the government,
10 however, was any evidence that the money being spent by
11 Mr. Constantine belonged to anyone other than Mr. Constantine
12 or that he was not authorized to use certain funds. That,
13 ladies and gentlemen, is because it was Mr. Constantine's own
14 ownership in Eufora to sell. You heard Mr. Healy speak about
15 that. It was his money to spend.

16 It was also Mr. Constantine's money which he earned
17 from the Hawaii deal, which he was spending. And it was also
18 Mr. Gonchar's authorization for Mr. Constantine to use his
19 1.5 million which he deposited into Mr. Richards' account that
20 allowed Mr. Constantine to use those funds as he saw fit.

21 So when Ms. Komatiredy was firing off those
22 questions in rapid succession for effect, which I couldn't do
23 it, did you authorize Mr. Constantine to pay for racing cars;
24 did you authorize Mr. Constantine to use your money to buy
25 Playboy; did you authorize Mr. Constantine to pay his rent?

SUMMATION - LaRUSSO

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1 The answer's yes.

2 Unfortunately, ladies and gentlemen, the government
3 was asking the wrong hockey payers. And you may recall, they
4 did not ask those questions of Mr. Gonchar, who, by the way,
5 was the very first depositor in the Global Settlement Fund;
6 and, by far, the largest depositor in Mr. Richard's account.

7 They didn't ask Mr. Semple those questions either,
8 did they? I don't think the government would have liked the
9 answers they would have gotten. And speaking of Mr. Semple,
10 you may recall he testified that he was actually subpoenaed by
11 the government to appear as their witness in this very trial.
12 But then they mysteriously changed their minds at the last
13 minute.

14 Again, I don't think that they liked his answers any
15 more than Agent Galioto liked what Mr. Semple had to say when
16 he spoke with agent Galioto and the Southern District United
17 States attorneys. You remember that testimony.

18 Ladies and gentlemen, you may recall Mr. Miskiewicz
19 saying, I think it was last Thursday, that it was Steve
20 Rucchin's turn to get ripped off. Do you remember him saying
21 that? Let me remind you about Steve Rucchin. He only
22 authorized his money that was deposited in the Global
23 Settlement Fund to be used for the legal action against Ken
24 Jowdy. Do you recall that testimony? If you don't, you can
25 have it read back to you to determine the accuracy of it.

SUMMATION - LaRUSSO

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1 That's why he deposited only \$50,000 while everyone else
2 deposited \$250,000.

3 Also, that's why he didn't get the comprehensive
4 authorization e-mail for all the others that included Avalon,
5 The Palm, PR, Falcon, Eufora, et cetera. That's why he only
6 got the e-mail authorization for Richards to sue Jowdy.

7 Examine the evidence, look at his testimony and
8 Ronald Richards' account, I believe it's Government 757, which
9 shows his deposit of only 50, and ask yourself why. That's
10 why 100 percent of his money went to Richards as a retainer
11 for the Jowdy litigation. Proper authorized use.

12 Ladies and gentlemen, thinking of that, it tends to
13 validate, and, in fact, does validate that all the others who
14 did get the comprehensive authorization e-mail and paid
15 250,000 knew that they were getting into Avalon, The Palms,
16 P.R., Falcon, and the Eufora deal.

17 There was substantial amount of cross-examination of
18 the hockey players who initially did not remember the full
19 extent of that authorization. But by the time
20 cross-examination ended with some of them, it was pretty clear
21 that it was a "broad purpose" use of the money.

22 In regards to Eufora, you heard testimony from
23 Mr. Semple, Mr. D'Ambrosio, and Mr. Kennedy, the last few
24 witnesses that you had. You also heard from Mr. Kenner. You
25 saw documentary evidence which clearly shows the ownership

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1 interest in Eufora, which was being sold in 2008. And I
2 emphasize this, as Mr. Healy did, it belonged to
3 Mr. Constantine. It was his shares to sell.

4 And the charts that the government put up in regards
5 to the sale of those shares seems to indicate an improper use
6 of the money. When, in fact, Mr. Constantine, with the shares
7 having been received from Mr. Daniel Kennedy, had the absolute
8 right to do with that as he wanted.

9 And ladies and gentlemen, you know, and to the
10 extent that certain investors, the clients of Mr. Kenner's who
11 purchased that interest from CMG, were told something
12 different. I emphasize that, that they may have been told
13 something different about who was selling what or what that
14 money would be used for. Or, to the extent they even
15 remembered such representations at all, the evidence is clear
16 that Mr. Constantine had no involvement or knowledge
17 whatsoever in those representations. This is because
18 Mr. Constantine had neither met nor spoken to any of these
19 investors until May of 2009.

20 There were witnesses, two of them, Mr. Nash and
21 Mr. Murray, who testified that they may have met or may have
22 spoken to Mr. Constantine -- you may remember they testified
23 to that -- prior to making their investment in Eufora in 2008.

24 Well, they were clearly mistaken, cross-examination
25 showed that, considering the fact, in Mr. Nash's case, he said

SUMMATION - LaRUSSO

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1 he was at the Avalon office building when we know for a fact
2 that it was still under construction and not yet inhabitable
3 until late 2008, months after he had made his investment.

4 You may recall him actually stating that he did not
5 go into the hangar itself, but the Falcon jet was at that
6 location. You saw the picture from Mr. D'Ambrosio, you recall
7 the testimony, there was no Avalon building there for him to
8 meet at. He was mistaken.

9 Furthermore, if you remember, I think Mr. Healy
10 actually referred to this, the company had not been
11 contemplating producing the TV commercial until 2009 when they
12 got the awards. Almost a year later. So the conversation
13 that Mr. Nash was recalling didn't occur in 2008. It occurred
14 in 2009. He was not there; he was mistaken.

15 By the way, Mr. Constantine did meet Mr. Nash, as I
16 said, for the first time in his home, I believe the testimony
17 was, in 2009, regarding the Global Settlement Fund. And
18 Mr. Nash subsequently did visit Avalon hangars, but at a
19 different time. It was over a year after he bought his
20 interest in Eufora from Constantine Management Group.

21 Mr. Murray, similarly, you can look at his testimony
22 confused the date he first met and spoke to Mr. Constantine
23 about Eufora, at Hennessy Restaurant in California. Which,
24 again, was after he purchased his interest in Eufora from Mr.
25 Gaarn, and just prior to him making his contribution to the

1 Global Settlement Fund.

2 You may recall, this was ultimately brought out by
3 me helping Mr. Murray remember whether he was still playing
4 hockey in the NHL, and having compared that timeframe when he
5 met with Mr. Constantine and Mr. Kenner at Hennessy Bar. His
6 testimony is up there for you to look at in terms of the
7 discussion we had. But do you remember when I mentioned
8 Hennessy Bar, he perked up. He remembers the bar but he
9 couldn't remember the date because he was confused.

10 More importantly, we heard no evidence whatsoever
11 that any of these individuals were deprived of their interest
12 in Eufora, whoever they bought it from. That is very
13 important, ladies and gentlemen. Time and again we heard
14 testimony that the hockey players were aware, at a minimum,
15 vaguely familiar with the fact that they held their interest
16 in Eufora through a holding company named AZ Eufora Partners,
17 you heard a lot about that, which Mr. Kenner had set up for
18 them. After all, most of them signed on and sued Mr. Kenner
19 at the behest of Attorney Michael Stolper and others, the
20 named plaintiff being that very entity, AZ Eufora Partners.

21 We also have seen plenty of evidence that AZ Eufora
22 Partners' ownership interest in Eufora is, contrary to some
23 speculation, alive and well; at least as far as the Arizona
24 Corporate Commission, the official agency of that state, and
25 Eufora's books and records.

SUMMATION - LaRUSSO

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1 You may remember, I believe being displayed as one
2 of the pages on that Arizona Commission official website taken
3 from May of 2015, which was just prior to or at the beginning
4 of this trial, and it shows, ladies and gentlemen, that AZ
5 Eufora Partners still has that interest.

6 Recall some of the hockey players, "I don't know if
7 I still have an interest in it." Well, they do. It's there
8 on the official web page of the Arizona Commission.
9 Regardless of whatever documents were introduced, some
10 claiming they're accurate records of Eufora and then some
11 claiming that they're not accurate, what's official is what's
12 on that website.

13 The fact that the managing member of AZ Eufora
14 Partners -- remember his name? Tim Gaarn. Well, since the
15 NHL players' advisor, that's Mr. Kenner, has seemingly failed
16 to communicate this information to the members of AZ Eufora
17 Partners cannot fall on Mr. Constantine's shoulders.
18 Particularly since each and every member of AZ Eufora Partners
19 had an open line of communication -- I have it underlined --
20 with Mr. Constantine since 2009, and elected never to use it.

21 Why is that underlined? You remember the testimony
22 of some of the witnesses, they never had a problem speaking to
23 Mr. Constantine. We know he likes to talk, but he talks
24 sense. He talks -- he answers questions. He provides
25 information. He's been called straightforward from many, many

1 of the witnesses.

2 But what is even more disturbing, ladies and
3 gentlemen, is the show that the government has tried to put on
4 for you in this regard. Let me show you what I mean. You may
5 recall time and again from one government witness to another,
6 both of the prosecutors asked the same question; a question
7 which they knew full well is misleading and not applicable to
8 the situation at hand. But in order to portray that the
9 players had been deprived of the interest in Eufora, they
10 asked the question anyway. It was only when Mr. Miskiewicz
11 was questioning Mr. Kenner, someone who knows better, that the
12 truth came out. The truth being that one does not receive a
13 stock certificate in an LLC. So the use of the word is
14 misleading, and was during the questioning of those witnesses.

15 Ladies and gentlemen, we also heard testimony that
16 the money related to the helicopters and the racing
17 sponsorships -- I'm sure you remember the names. One of them
18 was Playboy, we heard that often enough -- in fact, flowed in
19 the opposite direction from what the government would have you
20 believe. And since the bank records are in evidence, I'd like
21 to take a moment to show you firsthand.

22 Do we have those?

23 The ones that are being put up there are Constantine
24 Management Group's bank statements that will show you deposits
25 made after a helicopter sale and from Vonage, which was one of

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1 the sponsorships of Playboy. This is what is known as hard
2 documentary evidence that Mr. Constantine did not steal hockey
3 players' money to buy helicopters and fund his racing deal.

4 In fact, he sold his helicopter and he invested a
5 great deal of the proceeds from that sale into Eufora for the
6 benefit of all the investors. In other words, this is a
7 phrase we heard, I'm sure you understand it, he did not make a
8 "capital call" for his investors.

9 Keep in mind, ladies and gentlemen, he had every
10 right to make a capital call to the investors in Eufora so he
11 wouldn't have to sell his helicopter and fund his company.
12 You heard the testimony, he had the right to call up the
13 investors and have them pay their fair share of the expenses
14 to keep Eufora going.

15 You heard testimony from Mr. D'Ambrosio that that
16 was actually a point of contention between them; they actually
17 argued over whether or not to have the investors further put
18 money into the company because this, in fact, is what
19 typically happens in business. But Mr. Constantine didn't
20 want to do a capital call. Instead, he sold an asset under
21 the company itself so as not to burden the investors or to
22 dilute their interest.

23 Jumping ahead, he did the same thing with the
24 consulting fees he earned and the racing sponsorships he
25 generated -- specifically, the bank records are in evidence.

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1 Again, they're available. You will look at them if you need
2 it -- showing that he raised millions of dollars in racing
3 sponsorships and lent over 1 million of it to Eufora, and
4 that's just between 2006 and 2008. All without putting his
5 hand out to the investors.

6 I believe during the trial we were examining
7 Mr. Wayne, and I showed him a stack of bank checks that came
8 from Mr. Constantine's personal account. Nothing can ever go
9 right, but that's okay. You'll remember the testimony and
10 remember the exhibits. They're available to you in evidence.
11 It's a stack like this. It will show it was coming from
12 Mr. Constantine's personal account into Eufora.

13 You might also remember we broke out a stack of
14 those checks during the end of the trial where the memo is --
15 Exhibit C-249. And then we broke out a stack of those,
16 C-249-A, when we were trying to explain the memo entry
17 "deposit value loan." He was putting his own money into value
18 loan for his own personal expenses.

19 So these are the representative samples you can look
20 at to determine -- from Mr. Constantine's account which
21 Mr. Wayne testified played no role in the charts that he
22 prepared -- these are available for your examination.

23 Interestingly, we also heard testimony numerous
24 times about how hard Mr. Constantine worked to build value for
25 the investors. It came out not all at once, but it came out

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1 during the course of the trial. Over a 12-year period, with
2 the exception of a few months, he never took a salary from
3 Eufora or the Global Settlement Fund.

4 Let's just ponder that for a moment. The government
5 is alleging that Mr. Constantine was involved in a criminal
6 conspiracy from 2002 to 2013 to steal money from investors.
7 And in all the while since he founded the company in 2001, he
8 did not take advantage of the easiest and, actually,
9 completely legal method, I might add, of taking a salary.
10 Does that make any sense?

11 Contrast that, ladies and gentlemen, to Mr. Kaiser,
12 who testified that he took over half a million dollars in
13 salary from the Hawaii deal, which was the hockey player
14 money. And what did he do for that? Nothing. Maybe a stake
15 in the ground. Read his testimony where he tells you, under
16 oath, that he got what he wanted in the Lehman loan, his money
17 back, including three year's salary of \$195,000. Greed,
18 ladies and gentlemen, is the motivation behind most crimes,
19 particularly these.

20 I ask you, if Mr. Constantine was as greedy as the
21 government would have you believe, why would he risk
22 everything to steal money when he simply could have paid
23 himself a salary?

24 Do you think that anyone involved in this case would
25 have batted an eyelash if Mr. Constantine said hey, guys, I'm

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5898

1 going to be paying myself a couple hundred thousand dollars a
2 year from Eufora, or a hundred thousand dollars from the
3 Global Settlement Fund?

4 Do you think Mr. Ranford or Mr. Murray or
5 Mr. Gonchar would have said, Hey, Tommy, I know I made
6 \$5 million a year playing hockey, but I don't think it's fair
7 for you to be paid for what you were doing to help us or for
8 creating Eufora and the eight patents on our collective
9 behalf? I don't think so, ladies and gentlemen. But the
10 government would have you believe that he took \$17,000 to
11 appear on a television show.

12 I also told you that Mr. Constantine was sitting
13 here due to certain prosecutorial misconduct by Agent Galioto.
14 Let's talk about this just for a moment. This is an
15 individual who spearheaded this entire investigation, two
16 different districts over a six-year period. You heard
17 Mr. Semple testify that Agent Galioto ignored Mr. Semple's
18 financial analysis which clearly showed that Agent Galioto's
19 version of what happened is fundamentally wrong; and you heard
20 Berard testify that his statement under oath in his deposition
21 was simply a misunderstanding, even though both Mr. Berard and
22 his attorney stated on the record that they had been
23 instructed by the FBI not to ask questions about Phil Kenner
24 or the Global Settlement Fund.

25 The question also begs to be asked: Where is Jowdy

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1 in all this? You've heard the government accuse Mr. Kenner of
2 literally making up allegations against Mr. Jowdy as a
3 mechanism to deflect his own wrongdoing. But did they
4 investigate Mr. Jowdy to refute those allegations? No, they
5 didn't. But we certainly got to hear Mr. Will Castro of the
6 TV show *Unique Whips* talk about plaintiffs, didn't we? And we
7 sure got to hear from the gentleman at Playboy Enterprises
8 talk of Constantine's visits to the Playboy mansion.

9 Talk just for a minute about Mr. Gentry. He was the
10 former CEO of Eufora and the individual who was instrumental
11 in the alleged \$700,000 bond Eufora fraud which is charged in
12 the indictment. He's the same guy, ladies and gentlemen, if
13 you remember, he tried to orchestrate the attempted hostile
14 takeover of Mr. Constantine's company after Mr. Constantine
15 had uncovered the fraud that he and Gaarn had committed, and
16 had stripped him of his equity in his company. Where's he in
17 all this?

18 You may remember, his name is on the e-mails, along
19 with Mr. Gaarn's, directing the players' \$700,000 investment
20 into Eufora and the subsequent payout to Mr. Gaarn, not
21 Mr. Constantine. I believe it was Exhibit C-140 that was
22 shown to you by Mr. Haley. It was held out as the one that
23 showed all of the monies that actually were being contributed
24 by the hockey players, including Ranford, sent into Eufora and
25 then out of Eufora to Mr. Gaarn's account in Wachovia, New

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1 Jersey.

2 Do you recall that e-mail? Mr. Constantine wasn't
3 on that chain. In fact, it was Mr. Constantine that brought
4 these matters to the attention of the investors. Yet, here he
5 sits, a defendant himself, for the same allegations that he
6 had disclosed.

7 This exhibit, C-140, which now I remember Mr. Healy
8 had said it was page, clearly shows what was happening in
9 regard to the movement of money out of Eufora that had been
10 invested. And it was Mr. Constantine that was the one that
11 was publically accusing the individuals behind it. You heard
12 the Home Depot tape. There's no doubt that that was part of
13 what Mr. Constantine was alluding to. You heard the testimony
14 of some of the witnesses.

15 Let's talk about Mr. Gaarn for a moment. Mr. Gaarn
16 sat here and testified as a cooperating witness for the
17 government with a non-prosecution agreement, which Mr. Haley
18 explained to you this morning, and said point blank,
19 Mr. Constantine knew nothing about those wires. He also
20 stated repeatedly that he never broke the law or conspired
21 with Phil Kenner with regard to this. This is Gaarn's
22 testimony (reading):

23 "QUESTION: By the way, this particular e-mail that
24 we're going over, Mr. Constantine had nothing to do with this,
25 is that correct?"

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1 ANSWER: Correct.

2 QUESTION: He's not listed on these e-mails,
3 correct?

4 ANSWER: Correct.

5 QUESTION: Nothing to do with the favors you were
6 doing for Mr. Kenner, correct?

7 ANSWER: Correct.

8 QUESTION: But we know that Mr. Gentry did, is that
9 correct?

10 ANSWER: Yes, he was involved.

11 QUESTION: Would you agree with me?

12 ANSWER: In the cover-up."

13 We also know, as Mr. Haley told you this morning,
14 that Mr. Gaarn is listed in the indictment as a coconspirator.
15 Actually, he's listed as Coconspirator-1. A coconspirator is
16 someone who has, as you will be charged by the Court later,
17 criminal involvement. That's a coconspirator in laymen's
18 terminology. And he was called here for the express purpose,
19 I believe, admitting that he actually committed this crime and
20 he did it with the cooperation of Phil Kenner. He didn't do
21 that.

22 To the extent that the government tried to
23 suggestion that Mr. Gaarn simply didn't know he committed a
24 crime, that doesn't cut it, ladies and gentlemen. In order to
25 be in a conspiracy and conspire with others to commit a crime,

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1 you have to have intent and know you are committing one, as
2 the Court will later charge you.

3 But what is somewhat disturbing was, during the
4 summations by the government they dismissed this with well,
5 that's something you can think about, for you to determine.
6 Meaning, you've got to determine whether he's telling you the
7 truth on the stand or, with the wave of the hand by the
8 prosecutors, he's lying to you. Because if you believe he's a
9 coconspirator, then he's lied under oath.

10 What does that leave you with? That leaves you with
11 a witness that's put on by the government to support their
12 case, that the government is asking you to find that he may
13 have lied.

14 I remember, I believe it was the opening statement.
15 I got it wrong before. I think I'm going to get it right this
16 time. We also talked about the government's ready, fire, aim,
17 approach to this whole investigation. Well, you can actually
18 got to witness this firsthand; jumping to conclusions without
19 doing a thorough investigation. You may recall during
20 cross-examination, the defense introduced a lease agreement
21 between Mr. Edenholm and Mr. Constantine for the house -- I
22 wrote these down because I don't want to make a mistake -- for
23 the house purchased by Mr. Edenholm home from the proceeds of
24 his sale of his Cessna airplane to the Global Settlement Fund.
25 And then the house was rented to Mr. Constantine. The plane,

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1 as you may recall, was then given to Joe Juneau to settle his
2 claim and ultimately saving the Global Settlement Fund
3 \$100,000.

4 The government would have you believe that
5 Mr. Constantine was living free in this house, or he was
6 paying a kickback to Mr. Edenholm for buying his house out of
7 foreclosure. Well, this lease, ladies and gentlemen, undercut
8 the Government's position, showing that there was an
9 arms-length transaction between Mr. Constantine and
10 Mr. Edenholm home, and Mr. Constantine was paying fair market
11 value for the lease of his house.

12 The prosecutor was so anxious to disprove the
13 authenticity of this document, which clearly undermines their
14 theory, that she objected before Edenholm could complete it
15 his answer when he was trying to say, quote, "I have not seen
16 this agreement for quite some time," end quote. Remember
17 that? And after the objection, Judge Bianco asked the witness
18 to finish his answer, which he did. I believe that's on
19 page 1681.

20 Then you remember, ladies and gentlemen -- let me
21 clarify further what I'm talking about. You probably now know
22 that, after spending eight weeks with us, we typically give
23 one copy of the document to the witness, one to the
24 prosecutor, and, in this particular case, one to Mr. Haley. I
25 think at that time I was calling him Healy, but I've now

1 gotten it correct.

2 You may recall the prosecutor doing her redirect
3 examination of Mr. Edenholm was comparing the signature pages
4 of the multiple copies of the lease agreement between
5 Mr. Constantine and Mr. Edenholm. Remember that? And you
6 also heard a lot of testimony about the authenticity of
7 certain signatures in this case.

8 Well, in this particular instance, the prosecutor
9 seemed to have more concern with the signatures on the lease,
10 and going from one document to the other, examining each copy
11 thoroughly. And at one point, noticing that the original
12 agreement that the exhibit was copied from was missing the
13 signature page. That's on transcript pages 1692 to 1695.

14 So what did she do? She immediately explained,
15 "Your Honor, I'd like to introduce this copy into evidence."
16 "This copy" being the original and the one that happened to be
17 missing the signature page. The accusation being that the
18 remaining three copies which had signature pages were some
19 sort of forgery because the original lacked the signature
20 page.

21 You may also recall myself and my colleague,
22 Mr. Oliveras, standing up at that point and asking for a
23 side-bar, and Judge Bianco addressing you thereafter. The end
24 result being, you were informed by the judge that Mr. Oliveras
25 accidentally forgot the original signature page on the copy

1 machine during a break.

2 The point, ladies and gentlemen, is that there was
3 no investigation where this missing page might be; there was
4 no pause to understand what could be a reason for the missing
5 page. All it would have taken would have been to walk a few
6 feet and ask a few simple questions. Hey, there's a page
7 missing. Do you know anything about it? That didn't happen.

8 The prosecution immediately implied wrongdoing right
9 before your eyes, in realtime, without the most rudimentary
10 investigation. Instead, there was and on-the-spot indictment
11 of my client for fraud when the answer to the question was a
12 few feet away sitting on the copy machine.

13 That, ladies and gentlemen, is a prime example of
14 the government's approach to this entire case. You want to
15 talk about a microcosmic, to use Mr. Miskiewicz's word, what
16 this case is about, that's it.

17 You also heard the prosecution argue that
18 Mr. Ranford invested \$400,000 into the Global Settlement Fund.
19 Only to learn from us on cross-examination a few minutes
20 later, using bank statements from the government's own
21 production of subpoenaed documents, that Mr. Ranford's initial
22 \$100,000 contribution was returned to him by Mr. Constantine.
23 That is Government Exhibit C-180. And you can take a look at
24 the Ron Richards' statements as well, Government Exhibit, that
25 would be 757, which is the list of all of the investments of

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1 the contributions made to the Ron Richards Trust account. And
2 you'll see the \$100,000 going in and the \$100,000 going out,
3 there's no question about that. Another example of jumping to
4 false conclusions without properly doing an investigation.

5 You heard a IRS Special Agent Joshua Wayne. He
6 testified that notwithstanding that this investigation spanned
7 over six years, he had not examined or considered
8 Mr. Constantine's personal records in preparing his charts
9 that the government is asking you to rely on as an accurate
10 depiction where the money wound up. I showed you some of the
11 text showing contributions by Mr. Constantine, personally, to
12 Eufora.

13 More importantly, \$7,000,000 which I alluded to,
14 transacted between that specific amount in Mr. Constantine's
15 various -- excuse me -- between that specific account and
16 Mr. Constantine's various business accounts, and yet they have
17 not been examined? Again, that would be on transcript
18 page 4067.

19 Ladies and gentlemen, at the risk of being
20 redundant, let me say it again. My client is on trial for his
21 life, facing prison, the government did not even take into
22 account his personal account records?

23 You also heard Agent Wang testify you saw that
24 multiple financial transactions which are clearly relevant to
25 this case have been blatantly ignored. The corresponding

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1 charts he produced by the government did not even reflect some
2 of those transactions.

3 We introduced separate charts, 5-C, I believe 7-C,
4 and 10-C, to give you a demonstrated reference of transactions
5 that had significance to what was on those government charts.
6 You even heard Agent Wayne say that he actually met with
7 Mr. Jowdy, but failed to ask him a single question about the
8 \$1.5 million which was diverted from Hawaii to Mr. Jowdy.

9 Ladies and gentlemen, that transaction actually was
10 reflected on the government's chart. Their exhibit is Chart
11 5. It deserves a little more recognition in terms of the --
12 because when Mr. Wayne was testifying, I don't know if you
13 noticed his demeanor, but it changed a little bit when these
14 questions were asked, as if he knew this should have been part
15 of his investigation. But that's for you to determine. You
16 have the right to examine a witness and their demeanor, and
17 ask the questions and draw a common sense conclusion from that
18 in terms of trying to determine a person's credibility.

19 We have heard so much about this case, about the
20 involvement of Mr. Jowdy. And we have two entities up there,
21 Hope Abetti (ph), and I'm sure I'll get that wrong,
22 1.5 million in the Baja development. Both corporations are
23 controlled by Mr. Jowdy. By the way, that Mr. Joshua Wayne
24 met and yet never asked them about this. This is what we are
25 alluding to in terms of doing a thorough investigation,

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1 answering all the questions that have to be answered. This is
2 ignored.

3 As you can also see from the government's charts,
4 the other ones, and the corresponding bank records,
5 Mr. Miskiewicz was kind enough to point out to you that
6 Mr. Kaiser received 70,300 from the alleged -- and I'll call
7 it the \$700,000 Eufora fraud. I think one was a wire for
8 40,300 and one was for 30,000.

9 But in an effort to cleanse Mr. Kaiser of any
10 wrongdoing, the government was sure to show you that he gave
11 the money right back, for whatever reason, to Mr. Kenner. But
12 what Mr. Miskiewicz didn't show you was that Mr. Kaiser
13 received an additional \$105,000 from that alleged \$700,000
14 fraud that he kept. The bank records will show it.

15 Does that seem right? They are literally hiding
16 this information from you while they're going out of their way
17 to point out that my client, Tommy Constantine, received two
18 \$500 wires from the \$700,000 fraud. It's right there in the
19 chart. But the evidence is that my client had no knowledge of
20 this fraud, who is directing the movement of the money. He
21 got two \$500 checks.

22 By the way, ladies and gentlemen, you know, we've
23 heard so much about checks, snapshots. I think we've used the
24 word "snapshot of time." But you can't simply take a snapshot
25 of time for ten years of these bank records and make a

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1 determination of what has happened here. You even heard the
2 FBI forensic accountant, Mr. Petrellese, he testified that he
3 had no idea what the purpose was for any of the transactions,
4 hours that he was involved in.

5 On that basis, the government's characterization of
6 all of these transactions is simply improper. They admittedly
7 don't know what any of these payments were for. You heard
8 Mr. Miskiewicz say that Mr. Constantine and Mr. Kenner were,
9 quote, "financially intertwined."

10 Surprising, that may be the only thing we and the
11 government actually agree upon. But being financially
12 intertwined is not criminal. Mr. Kaiser and even Mr. Peca
13 were intertwined with Mr. Kenner, particularly in the alleged
14 \$700,000 Eufora transaction. In fact, just about everyone
15 that we have heard about during this trial was financially
16 intertwined with Mr. Kenner, but they're not sitting here as
17 defendants. I ask you: What is the difference between the
18 money Mr. Kaiser received and the money Mr. Constantine
19 received?

20 We also heard Mr. Miskiewicz drill Mr. Kenner about
21 his efforts to avoid triggering a CTR, or a cash transaction
22 report. I'm sure you remember that. That's when Mr. Kenner
23 was apparently withdrawing less than \$10,000 at a time from
24 various banks. Ladies and gentlemen, CTR is a form directly
25 related to the Internal Revenue Service. It's certainly the

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1 kind of record Agent Wayne and the government would have
2 direct access to.

3 But when Ms. Komatireddy elicited testimony from IRS
4 Joshua Wayne regarding Mr. Constantine allegedly making a
5 hundred thousand dollar cash withdrawal, do you remember that?
6 When, in fact, Mr. Constantine was simply doing a counter
7 debt. Remember that? A term that Mr Wayne could not define,
8 by the way, other than to say he thinks it's a counter debit;
9 tellers.

10 Let me make it clear. If Mr. Constantine did
11 withdraw \$100,000 in cash, which he did not, that's not a
12 crime. But it makes for one hell of a broad stroke
13 allegation, doesn't it?

14 The point is, ladies and gentlemen, they did not
15 produce any credible evidence that Mr. Constantine took out a
16 \$100,000 cash withdrawal. And they certainly had access to
17 all of the CTR information, and didn't produce it. If it was
18 a cash withdrawal of \$100,000, in excess of \$10,000, there
19 would have been a report and would have been on file with the
20 IRS and it would have been before you to prove that it was a
21 cash transaction.

22 And when I asked Mr. Wayne about well, this is the
23 Bank of America. Did you inquire about their practice? What
24 does counter debit mean? Did you get any information as to
25 whether it was a cash withdrawal or maybe an inter-transfer

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1 among accounts?

2 If I'm raising my voice, I apologize. This is just
3 another instance of, at best, a sloppy investigation. At
4 worst, not conducting the most basic of investigation that you
5 make when you're a criminal case, making an accusation.

6 During the prosecutor's summation they said actions
7 speak louder than words. Let's take a look at my client's
8 action, shall we? He worked at Eufora for 12 years. He
9 didn't take a salary except for those few months after the
10 Neptune loan.

11 When Mr. Juneau testified repeatedly, look at his
12 testimony, that he thought his investment in Avalon was
13 \$500,000, it was Mr. Constantine who reminded him that it was
14 actually \$550,000. That's transcript pages 295 to 297. An
15 easy \$5,000 he could have put in his pocket if he's what the
16 government would have you believe.

17 You heard testimony from Mr. Peca, and corresponding
18 evidence which showed that both Mr. Peca and Mr. Kenner, for
19 whatever reason, they failed to exercise Mr. Peca's \$166,000
20 option agreement to receive his interest in Eufora. That
21 agreement was introduced. I believe it was C-25. Yet,
22 Mr. Constantine honored it when he had no legal obligation to
23 do so.

24 Now, you heard, and I'm not going to review their
25 testimony because it's only last week -- I hope it was last

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1 week. I hope time didn't go by more quickly. You heard
2 Mr. Gonchar and you heard from Mr. Semple. And I
3 mispronounced it originally as Rosenbloom, but it's Rozenboom,
4 explained how Mr. Constantine negotiated to alleviate a
5 \$1.3 million personal guarantee from Mr. Gonchar and
6 preserve -- this is the point that's being forgotten -- and
7 preserved the million dollars of equity that had been invested
8 by four other hockey players in Diamante Air; all without any
9 compensation whatsoever to Mr. Constantine.

10 You heard testimony from Mr. Rozenboom describing
11 how Mr. Constantine advertised the second airplane, the
12 Metro 3, for almost a year at his sole expense, and eventually
13 found a buyer which further reduced the obligation to the
14 bank.

15 What did Mr. Constantine do next? Well, when
16 Mr. Gonchar received a bill for over \$70,000 from the law firm
17 that he hired to defend the lawsuit from First Source Bank, he
18 took it upon himself to negotiate those fees down to \$15,000.
19 Again, with no compensation for himself.

20 What did Ms. Komatireddy do when Mr. Gonchar
21 explained how he reciprocated by allowing Mr. Constantine to
22 access the funds which Mr. Gonchar deposited into
23 Mr. Richards' account, she attacked him, suggested he was in
24 on it. Can you imagine Mr. Gonchar, Mr. Constantine,
25 Mr. Kenner, Mrs. Gonchar and the kids, all sitting in

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1 Mr. Gonchar's kitchen. Recall that testimony? He was present
2 when these discussion were taking place. Hey, let's rip off
3 Peca, Sydor, and the other guys, get you out of this personal
4 guarantee.

5 I can just see it now, Sergei and Mrs. Gonchar
6 saying, yay, I love this country, the kids cheering in the
7 background, yay. It's ridiculous. Actually, it's more
8 inappropriate. He came in here, told you what happened, and
9 was accused of participating in a conspiracy in his house with
10 his wife and his children.

11 You even heard Mr. Kennedy giving testimony
12 recalling how he met Mr. Constantine, and how Mr. Constantine
13 paid him a \$70,000 commission on a handshake, which
14 Mr. Kennedy never expected to receive. And in fact, had
15 forgotten about the transaction entirely.

16 How do those actions look to you, ladies and
17 gentlemen? Do they seem to be the actions of a crook?

18 Let's talk about the Hawaii deal for a moment.
19 Beginning in 2004, I believe that was the year my client,
20 among others, was engaged by Mr. Kennedy to seek funding, is
21 that correct? The agreement is 2004 and 2005. And that was
22 for the Hawaiian project. You heard a lot of testimony, you
23 know what I'm talking about. The project it was, you remember
24 the aerial map that was shown by the government, comprised,
25 actually, of 600,000 acres and not 200,000 related to the

1 Lehman deal. An engagement which, from the testimony from
2 Mr. D'Ambrosio and Mr. Kenner confirmed. There's no doubt
3 that it monopolized Mr. Constantine's time and efforts.

4 Remember Mr. D'Ambrosio's testimony? They actually
5 argued about it. You're diverting your time and effort to
6 this funding project and you're ignoring the responsibilities
7 of Eufora. They had quite a few discussions. I may be wrong
8 in the word, but he got a little agitated. An engagement the
9 government claims never happened. It never happened.

10 But the only evidence that this engagement didn't
11 occur is Mr. Kaiser's testimony. That's it. The person who
12 we've already talked about who enriches himself to the
13 disadvantage of all of the other individuals. He wants to
14 make sure he gets his money. Mr. Kaiser's testimony is that
15 he did not know who Mr. Kenner had engaged to help him raise
16 money for the project. I believe that's in the transcript. I
17 forgot where.

18 There's also Mr. Manfredi's lack of memory of his
19 own e-mails and conference calls. Actually, come to think of
20 it, Mr. Manfredi contradicted his own testimony on
21 cross-examination and recalled speaking to Mr. Constantine
22 specifically about Hawaii when they met in 2004.
23 Nevertheless, the government would have you believe that in
24 despite of extensive testimony, multiple e-mails, and at least
25 two signed joint venture agreements to the contrary. Remember

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1 the name Hilton? Remember the name Losch? Over a five or
2 six-month period, e-mails were exchanged with Mr. Losch in an
3 effort to fund the Hawaiian project.

4 And more importantly, ladies and gentlemen, and not
5 in dispute, Mr. Constantine, in fact, did raise the money to
6 save the Hawaiian property. I pause to let you know that this
7 is a significant event in the Hawaiian project. He made it
8 possible for the Lehman deal to even happen in the first
9 place. The government still alleges this is a fraud.

10 You remember the testimony in regards to the
11 significance of this. It was earnest money put down that was
12 going to be lost if they did not make the payments for the
13 purchase of the property; 60,000 plus dollars being paid a
14 week to keep the contract open. There was desperation to find
15 funding. This property was significant to the remaining
16 entire project because of its location.

17 It happened. He worked, and he worked diligently,
18 and was successful. But the government still alleges fraud.
19 Why? One of the reasons is because John Kaiser, purportedly,
20 purportedly, didn't sign the consulting agreement. Do you
21 remember that testimony?

22 Let me tell you something, ladies and gentlemen, the
23 testimony was also very clear, this is the point I would like
24 to make, my client was not there when those agreements were
25 signed by whoever signed them. The testimony was clear and

SUMMATION - LaRUSSO

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1 was not refuted, I might add, that Mr. Constantine signed the
2 documents first, and then Mr. Kenner took the originals to get
3 them signed by Mr. Kaiser later. You may also recall the fact
4 that the only known originals were found in Mr. Kenner's home
5 as a result of the search warrant.

6 So frankly, ladies and gentlemen, whether Mr. Kaiser
7 signed these agreement or even needed to sign these agreements
8 is immaterial to my client. He had a deal. He signed the
9 agreements and he did his job. In fact, he was -- I believe
10 there was one other, Mr. Gaarn, who may have done the job that
11 they asked to do.

12 As a result, the players -- and this is another
13 aspect, because of this the players' lines of credit were
14 substantially reduced when the Lehman loan finally was signed
15 and executed. Specifically, these lines of credit were
16 reduced by almost \$7,000,000 when the property was saved and
17 the Lehman deal closed.

18 And the fact that those lines of credit were
19 accessed again and the balances were again increased, that
20 also has nothing to do with my client. That's because
21 Mr. Constantine did not receive another payment from either of
22 the Hawaiian entities after 2007. You'll have to ask
23 Mr. Kenner, or as far as the evidence has shown, Mr. Jowdy,
24 about why those lines of credit, those balances were again
25 increased to the point that the players lost their money.

SUMMATION - LaRUSSO

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1 MR. LaRUSSO: Your Honor, I'm going to be moving to
2 another section. Would you like to recess at this time.

3 THE COURT: I don't think the jurors' lunch is here
4 yet. I'll let you know when it arrives.

5 MR. LaRUSSO: Yes, Your Honor.

6 I'm going to come out with this one. This would
7 have a been good one, but it's just as appropriate now. I ask
8 you to find a single piece of evidence that Mr. Constantine
9 even knew these lines of credit existed. I'm still waiting to
10 hear. Just to refresh your recollection, not one person, not
11 a single player testified that Mr. Constantine had anything to
12 do with these lines of credit; and I asked. Not Mr. Kaiser,
13 not Mr. Manfredi, not Mr. Kenner, not even Mr. Mascarella --
14 I'm sure I mispronounced that and I apologize -- from Northern
15 Trust, presented any testimony whatsoever that suggested that
16 Mr. Constantine had any knowledge of these lines of credit.
17 By the way, neither did the government present a stitch of
18 evidence in this regard.

19 Ladies and gentlemen, it's simple, he didn't know
20 anything about the Northern Trust lines of credit. In fact,
21 there's no evidence in the record to suggest that Mr.
22 Constantine even knew that Mr. Kenner's hockey players were
23 investors in the Hawaiian project. That's because Mr. Kenner
24 told Mr. Constantine and Mr. Grdina, this is C-158, "I own the
25 land." You can examine the documents yourself. "I own the

1 land." That's what's in there. Mr. Kenner.

2 Now, please, don't get me wrong. That's not to say
3 that Mr. Constantine didn't know Mr. Kenner had hockey player
4 clients. Of course he did. They were investors in Eufora.
5 But when they invested Eufora during that time period, they
6 invested their money directly into Eufora. The identity of
7 the investors was clear. The wires came directly from the
8 players into Eufora's bank account. You can look -- I believe
9 there's quite a few of those that were introduced into
10 evidence.

11 But that's not what happened in Hawaii.
12 Mr. Constantine's only point of reference was the names of the
13 two LLCs, I'm going to get them wrong, Ula Makika and Little
14 Isle IV, I got them, that were paying him and what Mr. Kenner
15 told him, which was nothing as it relates to the lines of
16 Northern Trust or his hockey player clients.

17 Now I'd like to discuss --

18 Leave that up there.

19 I'd like to discuss this issue about whether or not
20 Mr. Constantine put any money of his own into the Global
21 Settlement Fund. You heard testimony from Mr. Semple, a very
22 capable and credible person, testifying that Northwest Value
23 Partners and the \$124,985 deposit was Mr. Constantine, and
24 that it came from the sale of Constantine's M6 race car.

25 (Continued on the next page.)

Summation - LaRusso

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1 MR. LaRUSSO: That's on Government Exhibit 757
2 which is the spread sheet that Mr. Semple had prepared.
3 Now, Mr. Miskiewicz would have you believe that Mr. Semple
4 received his information regarding the deposit entirely
5 from Mr. Constantine who, as far as Mr. Miskiewicz is
6 concerned, is obviously not a credible source of
7 information. I think he used the phrase "garbage in,
8 garbage out."

9 But, ladies and gentlemen, Mr. Semple did not
10 rely solely on Mr. Constantine for answers, more
11 importantly, these guys sitting right here, our
12 government. You saw an e-mail with Mr. Kenner calling
13 Mr. Constantine the 500-pound guerrilla lining up certain
14 investors. He was happy the 500-pound guerrilla -- you
15 came through. It's not Mr. Constantine who is the
16 500-pound guerrilla. It's the United States government.
17 They have every available resource on this planet to
18 establish something as simple as whether or not this
19 deposit belongs to Mr. Constantine. Did they? They can
20 make a phone call, push a few keys in the government
21 computer to find out who Northwest Value Partners was and
22 who this money was from so they can come in here and say
23 Mr. Constantine is a liar, this money belongs to Jason
24 Wooley or whomever, here is the proof.

25 They sat here and simply tell you it's not

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1 Mr. Constantine's money notwithstanding the testimony of
2 Mr. Semple than to provide evidence to prove it. Did you
3 hear testimony or see evidence it's not Mr. Constantine's
4 money? I sure did. Didn't I hear garbage in, garbage
5 out? That is not proof. That's garbage, ladies and
6 gentlemen.

7 Now, let's take a few moments of your time --
8 I'm only looking at the clock to see if I have a
9 ten-minute piece or 20-minute piece.

10 THE COURT: Keep going.

11 MR. LaRUSSO: I'd like to address the
12 government's allegations against Mr. Constantine which
13 involve Nick Privitello and John Kaiser and
14 Mr. Privitello's investment in Eufora.

15 I mentioned John Kaiser because prior to
16 Mr. Privitello making the decision to invest in Eufora,
17 Mr. Kaiser was in fact the only person Mr. Constantine
18 ever spoke with regarding the Eufora investment; the one
19 we are talking about. To be clear, the evidence did show
20 Mr. Constantine certainly communicated briefly with
21 Mr. Privitello about where to wire his money just prior to
22 him doing so. We have the e-mails on that. But the
23 evidence was also clear that Mr. Privitello never received
24 a single e-mail about the Eufora business model or any of
25 the big licensing deals that were on the horizon or even

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1 the patents.

2 Think about that for a moment, ladies and
3 gentlemen. Are we to believe this individual who sat here
4 and testified he typically did not do high-risk
5 investments simply wired 200,000 to Mr. Richards' account
6 for his investment in Eufora and never received a single
7 e-mail which described the business he was investing in?
8 No e-mails about the company's intellectual property? No
9 business plan? No PowerPoint presentation? No copies of
10 the patents?

11 You saw how much information Mr. Constantine
12 circulated about Eufora and the other businesses to all of
13 the investors involved in the Global Settlement Fund.
14 Don't worry. I won't go through them all again.

15 You heard every witness I asked testify
16 Mr. Constantine was forthright, straightforward when he
17 had questions about their investments.

18 So the question I have is, why? Why did
19 Mr. Privitello not ask and why did Mr. Constantine not
20 provide any information to Mr. Privitello about Eufora?
21 And how did Mr. Privitello come to understand what he was
22 investing in? The answer is simply, ladies and gentlemen,
23 John Kaiser. It was John Kaiser that received the
24 multiple e-mails regarding Eufora's business model, the
25 patents and licensing deals from Mr. Constantine. And it

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1 was John Kaiser who explained and brokered the deal to his
2 pal Mr. Privitello. In fact, he even cut himself in on it
3 with what he called a side deal. Remember, the side deal?
4 Look at Mr. Privitello's testimony. That didn't come out
5 until cross-examination when he was confronted with some
6 irrefutable proof; side deal.

7 It was John Kaiser, ladies and gentlemen, that
8 received the -- I will call it use of investment proceeds
9 e-mail that Mr. Constantine provided just prior to
10 Mr. Privitello making his investment which explained
11 exactly what the proposed investment was going to be used
12 for. And that's our Exhibit C72. I believe that's up
13 there. You may remember this some time ago.

14 Mr. Constantine sent an e-mail to Mr. Kaiser on
15 November 25, 2009 and here is what he is telling him:

16 Monday, November 30, we need 250,000 for Bancorp
17 usage fees, urgent.

18 Monday, November 30, 250,000 to Neptune loan,
19 urgent.

20 Monday, November 30, 50,000 to Eufora for
21 payroll.

22 Tuesday, December 30, 50,000 to Eufora for
23 payroll.

24 Tuesday, December 30, 1 million to Neptune loan,
25 final payment.

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1 Any doubt who Mr. Constantine is discussing this
2 with? It's Mr. Kaiser.

3 This is critical, ladies and gentlemen, because
4 this essentially all boils down to what representations
5 were made and what was the intent. You will hear that in
6 the judge's charge.

7 If you look at the e-mail Mr. Constantine sent
8 to his sole point of contact leading up to this
9 investment, Mr. John Kaiser, you will see a pretty
10 detailed explanation why and how the money was going to be
11 sent. That explains that there is an urgent need, as I
12 said, to pay Bancorp, Eufora's issuing bank. And you can
13 also see very clearly not only is there a loan, there is
14 an urgent need to make a payment. In other words, ladies
15 and gentlemen, Mr. Constantine just as in the case of the
16 Global Settlement Fund could not have been more up front
17 about what this money was needed for and what -- he
18 couldn't have spelled it out more clearly.

19 You may recall during Mrs. Peca's testimony the
20 government tried to suggest at one point that the Eufora
21 loan and the fact that the patents were pledged was
22 withheld from the investors. Well, for starters, they got
23 the dates wrong. And there was no loan and the patents
24 were not pledged during the Constantine management group
25 Eufora sale that she was talking about. But even later on

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1 when they pivoted, alleged the same nonsense with respect
2 to the Global Settlement Fund investment in Eufora, in
3 this case Mr. Privitello's investment, it was made
4 perfectly clear to everyone there was a loan.

5 Don't forget, ladies and gentlemen, the same
6 folks claiming they didn't know there was a loan tried to
7 buy it; Mr. Privitello included. In any case, what is
8 important, ladies and gentlemen, is who was involved in
9 the representations being made about the investment and
10 what were those representations, what was the intent.

11 In order for Mr. Constantine to be charged with
12 this fraud, he would have to be on the side of the fence
13 so to speak where the representations are being made for
14 the government to allege fraud against my client. They
15 have to first place my client on the representation side
16 of the equation to show he did not do what he represented.

17 Let's start with that.

18 Mr. Privitello testified he spoke to Mr.
19 Constantine on the phone and that the call was very close
20 to the time when he received the first e-mail about where
21 to send the money. I believe that was the day --
22 actually, the day before or day of his transfer, either
23 December 6 or December 7.

24 Then Mr. Privitello sat right there and
25 testified that it was Mr. Constantine who actually made

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1 the deal with him. The problem for Mr. Privitello is that
2 during that very same call which he secretly recorded with
3 Mr. Constantine, he clearly stated he made the deal with
4 Kaiser.

5 Now, there was a tape that was introduced, C95.
6 Let's see if we have that queued. Let me work that up
7 during the lunch break and I will play that.

8 Ladies and gentlemen, he had to lie about who
9 made the deal because as long as Mr. Constantine is not on
10 the representation side of the fence, he cannot be held
11 responsible for what Mr. Kaiser may or may not have told
12 him about the investments.

13 Now, to address the representation side, let me
14 address the government's allegation that Mr. Constantine
15 diverted Mr. Privitello's money for unlawful purposes.

16 Firstly, let's talk about the government's
17 spread sheet which alleged that part of the diversion of
18 Mr. Privitello's money was paid to Josephine Lemon and
19 Mongus Solutions. We know from Mr. D'Ambrosio's
20 testimony, an employee of Eufora and the LLC, it belongs
21 to an employee of Eufora, Aaron Porter. As IRS agent, Mr.
22 Wayne, testified he did not know these individuals were
23 employees of Eufora because he did not speak with them.
24 You also can see from the government's own chart the money
25 which was inadvertently sent to AZ, Avalon collected and

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1 sent to Bancorp, the same Bancorp Mr. Constantine
2 disclosed as one of the intended uses of the proceeds for
3 the investment in the e-mail to Mr. Kaiser. So that
4 leaves the \$15,000 to Mr. Constantine's attorney in
5 Florida for the racing lawsuit, the same racing lawsuit on
6 the one hand that spawned the deposition transcript you
7 may remember the government was so keen to use to suggest
8 Mr. Constantine stated Eufora was worthless but on the
9 other hand suggests it is not related to Eufora and,
10 therefore, Mr. Privitello's money should not have been
11 paying the legal bill. In other words, when it suits the
12 government, they use the transcript for the racing lawsuit
13 to show it had statements related to Eufora when the legal
14 bill for that very lawsuit is being paid by Eufora. It's
15 a diversion.

16 By the way, you heard testimony from both Mr.
17 D'Ambrosio and Mr. Kenner that the \$15,000 payment for the
18 law firm was an approved business expense because it was
19 clear the plaintiff in that case was involving Eufora.
20 But the real question is, ladies and gentlemen, do you
21 really believe Mr. Constantine took in, excuse me, took in
22 a \$200,000 investment then used the money for Bancorp
23 employee salaries and broke the law to pay a lawyer?
24 Really? It's not like he bought himself a new car or took
25 a vacation with his wife. He got the approval of a number

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1 of individuals on the board and paid a lawyer bill for a
2 lawsuit clearly negatively impacting the company to the
3 detriment of all the investors including Mr. Privitello.

4 Now, I would like to talk about the audio clip
5 that Mr. Miskiewicz played during the summation, this is
6 important, of Mr. Constantine speaking with
7 Mr. Privitello. You will see, ladies and gentlemen, when
8 we complete the analysis, this was just another
9 manipulation and blatant mischaracterization by the
10 government and amounts to nothing more than street
11 theater. I will show you why.

12 You will notice that when Mr. Miskiewicz played
13 the tape, it was cut off immediately after Mr. Constantine
14 made the "fuck you" comment.

15 (Tape played.)

16 (Tape stopped.)

17 MR. LaRUSSO: Remember what he did after he
18 played the tape after that word was said? Walked around
19 the room repeating the word over and over suggesting that
20 the content of these words being spoken by Mr. Constantine
21 was in effect -- I apologize -- "fuck you, Nick, you are
22 not getting your money back."

23 And he did that because if he let you hear the
24 next few seconds of the tape, you would hear
25 Mr. Privitello was actually making a comment like a laugh.

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1 He is laughing because what Mr. Constantine is actually
2 saying is, you could have put "fuck you" -- I believe the
3 government's transcript says "Ronnie and your mother on
4 the memo line." You see once again, ladies and gentlemen,
5 if you peel back the onion, so to speak, far enough, the
6 truth comes out.

7 And in this instance it's clear Mr. Constantine
8 was referring to having no transparency into what
9 Mr. Privitello wrote on the memo line of his wire transfer
10 form when he sent the wire to Ron Richards. It's also
11 clear Mr. Privitello thought it was funny. And, ladies
12 and gentlemen, I think we can all agree that if
13 Mr. Constantine was saying "fuck you and your investment"
14 to Nick Privitello, any sane person would not find that
15 funny. More important, there are at least five or six
16 more clips of these two gentlemen talking about the
17 investments. If this comment was made, you certainly
18 would hear further conversation about this money which
19 doesn't occur.

20 Can we play that tape?

21 (Tape played.)

22 (Tape stopped.)

23 MR. LaRUSSO: We would always like to have a
24 PowerPoint presentation work properly. At this point
25 that's another tape I was going to play in a few minutes.

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1 What I would like to play, if I can, is the full
2 version of the conversation that Mr. Constantine was
3 having with Mr. Privitello where the word "fuck you" comes
4 in. And I will ask you to pay very careful attention to
5 the earlier portion. They are talking about
6 Mr. Constantine actually saying I'm interrupting you,
7 meaning if he is going to come out and accuse and use this
8 language, see in your own evaluation of this tape if
9 somebody would talk politely like that, sorry for
10 interrupting you. Then listen to the last part. You will
11 hear Mr. Privitello's comment or laugh and the full
12 statement about what this particular clip was really all
13 about.

14 THE COURT: How long is this clip?

15 MR. LaRUSSO: Short one. Not as long as the
16 other one.

17 THE COURT: Let's play this clip, then we will
18 stop.

19 MS. KOMATIREDDY: What's the clip number?

20 MR. LaRUSSO: Second of the two transcripts.

21 MR. OLIVERAS: The last tape I played was 95A.
22 This is the government's exhibit.

23 (Tape played.)

24 (Tape stopped.)

25 MR. LaRUSSO: I will leave with this. They were

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1 talking about Mr. Privitello's wire transaction form that
2 the government introduced where he puts on their 1.5
3 interest that was the evidence of the transfer to Ron
4 Richards' account. Mr. Constantine never sees that. What
5 he is saying, you can put anything on that form. That's
6 what he was talking about; wasn't talking about any kind
7 of money not being paid back to him.

8 Review the tape. Look at the transcript.
9 Compare the tape. Make your own judgment what really was
10 being said. And also look at the rest of the transcript
11 to see if this conversation that the government says
12 occurred about not paying him ever occurred; it didn't.
13 And the subsequent clips that the government showed
14 supports that.

15 Thank you, your Honor.

16 THE COURT: We will take the lunch break. We
17 will take a shorter break since nobody is going out for
18 lunch and reconvene 2:15.

19 I want to emphasize this, although you are
20 sitting back there eating together, you cannot and I
21 emphasize cannot discuss the case. It would be improper
22 for you to start discussing the case. We haven't
23 completed the summations and you haven't heard my
24 instruction.

25 You can talk about your weekend, the soccer game

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1 or anything else.

2 I will see you at 2:15.

3 Thank you.

4 (The jury leaves the courtroom.)

5 THE COURT: Let's be seated for one second.

6 I'm sure the government knows this, I want to
7 emphasize it, it came up at one of the sidebars during the
8 trial, I made a note of it, in the rebuttal, I want to
9 make sure there is no suggestion that we heard Mr.
10 Constantine's defense through Mr. Kenner or some reference
11 to that at sidebar in connection with -- not objection, I
12 want to make sure, obviously, when you have two defendants
13 in a case one testified and one did not, any suggestion
14 that the defense was heard through Mr. Kenner rather than
15 through Mr. Constantine would be improper. So I want to
16 make sure the government stays clear of anything remotely
17 clear of that.

18 MS. KOMATIREDDY: Understood.

19 THE COURT: Are you on time from what you
20 estimated?

21 MR. LaRUSSO: I think so, Judge. What did I go,
22 about an hour and a half? I don't think I will be more
23 than that; I'm pretty sure. I will give you a better
24 estimate when I go over it during lunch.

25 THE COURT: Okay.

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1 (A luncheon recess was taken.)

2 (Continued on the next page.)

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Summation - LaRusso

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1 A F T E R N O O N S E S S I O N

2 2:30 PM

3

4 THE COURT: Ready, Mr. LaRusso?

5 MR. LaRUSSO: Yes, your Honor.

6 THE COURT: Let's bring in the jury.

7 (The following ensued in the presence of the
8 jury.)

9 THE COURT: We will continue with Mr. LaRusso's
10 summation.

11 Go ahead, Mr. LaRusso.

12 MR. LaRUSSO: Thank you, your Honor.

13 Good afternoon again.

14 During the government's summation you heard
15 words spoken, *hostile takeover*, whatever. Pretty
16 dismissive considering what Mr. Constantine was put
17 through during that time.

18 I'm wondering how many witnesses including
19 government witnesses have testified to the same thing in
20 order for the government to treat the information as
21 credible: *Hostile takeover whatever*. Ladies and
22 gentlemen, this hostile takeover attempt was the reason
23 that communication ceased between Mr. Constantine and his
24 investors.

25 You heard every witness that was asked say that

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1 Mr. Constantine had been forthright and straightforward
2 whenever they asked him for anything. You heard
3 Mr. Kenner testify that Mr. Privitello was instructed by
4 Mr. Stolper not to take his money back or accept his
5 interest in the company because it was to be used as a
6 hook for their lawsuit and hostile takeover attempt. Many
7 witnesses confirmed what was going on at this time.

8 And by the way, ladies and gentlemen, that
9 \$400,000 from Mr. Privitello, Rizzi, Hughes, and Ethel
10 Kaiser is reflected on Eufora's books as a short-term
11 debt. And it was even recognized by the investor group
12 that ultimately did buy the loan in cooperation with
13 Mr. Constantine and Eufora.

14 I believe the document that you are being shown
15 now is the loan conversion agreement that took the loan
16 and put it back into Eufora. And the chart that Mr.
17 D'Ambrosio showed you reflected the fact that this was
18 treated properly in the loan conversion agreement and the
19 hockey players investments were covered. It is right
20 there.

21 Now, Mr. D'Ambrosio also testified about the
22 fact that multiple offers to return 100 percent of the
23 investment of Mr. Privitello, Mr. Hughes, Mr. Rizzi and
24 Mrs. Kaiser were made and they were ignored, further
25 corroborating what Mr. Kenner said. You know why they

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1 didn't want the money returned. They were looking to take
2 over the company. That was what was happening here.

3 And you recall the voice mail message that was
4 left on Mr. Rizzi's telephone back in June of this
5 particular time period. It was a very short voice mail
6 message where Mr. Constantine was explaining to Mr. Rizzi
7 that he is giving him his money back.

8 Does he get a return call? Does he get an
9 invitation: Yes, we want our money back? No, because
10 that is not what they wanted.

11 But it wasn't the only alliance between
12 Mr. Privitello and those who were trying to take over the
13 company that made the board reject Mr. Privitello's
14 investment. It was something also equally important. The
15 board wasn't even sure who was investing what amount and
16 for what interest.

17 You heard testimony of side deals and finders
18 fees. That is something that runs afoul of securities
19 laws and the board could not tolerate it.

20 I'm not going to play the tape that was played
21 in advance but you will recall the long conversation
22 between Mr. Constantine and Mr. Privitello that was played
23 earlier this afternoon where they talk about the side deal
24 and Mr. Privitello saying well, you know, I don't mind if
25 it is finders fee to Mr. Kaiser.

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1 But what was clear on that tape, and you have
2 the right to listen to it, was Mr. Privitello saying his
3 deal was with John for the 1.5 million, for the 200,000.
4 It was John who was behind this. And that's John Kaiser.
5 Not Mr. Constantine.

6 Let's talk about why Mr. Privitello did not
7 ultimately become a member of Eufora. I think the record
8 is pretty clear. And this is a little bit easier to
9 explain. It won't take is long. In two words, *hostile*
10 *takeover*. And without the *whatever*.

11 All one has to do is talk to any investor that
12 ever invested with Mr. Constantine who did not try to
13 hostilily take over his company and see if Mr. Constantine
14 treated them honorably and recognize their interest in the
15 company.

16 Obviously, ladies and gentlemen, the board was
17 not going to be falling over themselves to approve the
18 investment of Mr. Privitello when it became clear that he
19 was working with the enemy, Mr. Stolper and the rest of
20 them. And we heard testimony from Mr. D'Ambrosio and even
21 heard one of the voice mail recordings where
22 Mr. Constantine was trying to return the investment of
23 Mr. Kaiser, the investment of Mr. Kaiser's investors.

24 Now, you were shown a text message between
25 Mr. Kenner and Mr. Constantine which the government would

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1 have you believe is about Nick Privitello.

2 Remember this text message? Unfortunately, in
3 typical fashion the government did not do their homework
4 on this one, either. You may recall Mr. Kaiser and
5 Mr. Kenner testifying about an individual by the name of
6 Nick James. And you may recall also seeing bank
7 statements which show several payments to Mr. James.

8 Well, for starters, Mr. Constantine had not even
9 heard of Mr. Privitello, and vice-versa, until that
10 December of 2009. The email is earlier in November of
11 2009. And if you look closely at the cut of texts in the
12 top bubble, ladies and gentlemen, that was referred to by
13 Mr. Miskiewicz, this portion that you can't really see,
14 what you can ascertain is that those words may read, and I
15 think if you look closely at it, and we will try and put a
16 side creation to explain what was underneath those words.
17 If you read them, it actually says: *a trial and subpoena*.
18 Between the *a* and *trial* there is no space. You look at
19 it. You examine it. You see if that is possible. Those
20 words fit.

21 Now I ask you, did you hear Mr. Privitello
22 mention being at trial with Mr. Kenner or being subpoenaed
23 by Mr. Kenner? No, you did not.

24 And, by the way, I find it very interesting that
25 the government did not bring this text message up during

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1 Mr. Privitello's direct examination where we would have
2 had an opportunity to question him about it. No, they
3 waited until summation, when you could not elicit
4 testimony from Mr. Privitello to show you that it is not
5 Nick Privitello, but rather, Nick James.

6 And if that doesn't cast doubt on who is
7 referred to in this text, there is that minor detail of
8 the date of the text. Little things like it occurred a
9 month prior to Mr. Constantine even being in contact with
10 Mr. Privitello, according to the testimony of Nick
11 Privitello, himself. But let's not have the facts get in
12 the way of some good distracting theory.

13 I would like to take a moment to address the
14 Home Depot tapes, ladies and gentlemen. Now, you heard
15 testimony from Mr. Kenner that this tape is incomplete.
16 In fact the evidence shows the recording is approximately
17 27 minutes in length instead of the approximately 50
18 minute or so that Mr. Kenner testified was the original
19 length of the recording.

20 Well, the first question I have is, what was on
21 the rest of the recording? The second question I have is
22 that Mr. Kenner, and only Mr. Kenner, has authenticated
23 this recording notwithstanding the fact that it is
24 incomplete.

25 Keep in mind, ladies and gentlemen, that this

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1 recording was not created as a result of some government
2 warrant using high-tech surveillance recording equipment.
3 It didn't go through the normal chain-of-custody
4 proceedings with the FBI to preserve its authenticity, the
5 way the government wiretap recordings would typically go
6 through.

7 This recording was made bu Mr. Kenner on his
8 iPhone at a time when he and Mr. Constantine were
9 archenemies. Then he gave it to John Kaiser, his ally at
10 the time, who was also attacking Mr. Constantine, and then
11 they both gave it to Mr. Stolper who apparently gave it to
12 the government.

13 Putting aside the legal technicalities and
14 whether the tape is authentic, let's review the tape for
15 what it is. In order to do so, you must put this
16 conversation in context. What's going on at the time.

17 When was this tape made, ladies and gentlemen?
18 It was made while Mr. Kenner and Mr. Constantine were, for
19 lack of a better term, at war with one another, accusing
20 each of various wrongdoings and filing lawsuits across the
21 country.

22 Mr. Constantine saw what was happening and could
23 see that seven-plus years of hard work and real value, the
24 potential for tens of thousands and millions of dollars
25 slowly crumbling before his eyes. And that is a fact.

Summation - LaRusso

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1 The witnesses testified to the value of Eufora.
2 We know the difference between value and profitability.
3 Seeing the company that literally bankrupts him if he
4 funded it to keep it going just long enough to see it all
5 come together being burned to the ground by very same
6 people he was working for to reward their investment.

7 Mr. Constantine was trying to make it all stop.
8 Stop the destruction of the company that he poured
9 everything into. Stop the investors from destroying their
10 own investments. And stop two friends from destroying
11 what matters remained -- what tatters remained of their
12 friendship.

13 It was with this backdrop that you need to
14 listen to the tape and hear what is being said. The
15 government is resting its laurels on an analogy, ladies
16 and gentlemen. You heard Mr. Miskiewicz say here in his
17 closing argument that you don't need much more than the
18 Home Depo tape, and then reference pinching the getaway
19 driver and burning the house down: An analogy, ladies and
20 gentlemen, which is unclear who is being referred to.

21 Listen to the tape, ladies and gentlemen, you
22 will hear it. The government will say: See,
23 Mr. Constantine is referring to himself as the getaway
24 driver. And that would make sense if the next words
25 uttered out of his mouth on the tape wasn't, and I quote:

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1 *And I know you think I robbed the bank.* He was saying the
2 opposite, that he is not the bank robber or the getaway
3 driver.

4 Additionally, be sure to pay close attention to
5 the words spoken by Mr. Constantine. You will never him
6 say the word *we* to Mr. Kenner when he is referring to
7 criminal liability. He only uses the word *you*.

8 I ask you to look at the transcript and see how
9 often the word *you* is referred to and not *we* during the
10 testimony. We displayed one aspect of the transcript
11 where the word *you* appeared four times in an incriminating
12 aspect of that recording, not *we*. He only uses the word
13 *you*.

14 And since we know from Mr. Kenner's testimony
15 that Mr. Constantine did not know he was being recorded,
16 another significant factor, and since, as far as the
17 government is concerned, Mr. Kenner and he were partners
18 in crime for over a decade, you would think, if
19 Mr. Constantine was really a coconspirator of Mr. Kenner,
20 he would say the word *we*, wouldn't he?

21 This tape lasted, I believe, 26 minutes. Review
22 it.

23 Now, there is no doubt there was a lot of
24 trouble for everyone at that time. Lawsuits were being
25 filed. Hostile takeover attempts were being engineered.

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1 But, ladies and gentlemen, as far as Mr. Constantine was
2 concerned, these lawsuits and the destruction of eight
3 years of his hard work without salary was his only
4 concern. And that's crystal clear when you listen to the
5 entire portions of the tape played.

6 You also heard Mr. Miskiewicz' stories about an
7 infomercial and Billy Mays and his reference to
8 *but-wait-there's-more* line. But frankly, it is
9 inappropriate. Not relevant.

10 The last sentence of the Global Settle Fund
11 authorization email states, "*rather than spending money on*
12 *legal fees.*" This is the opposite of what Mr. Miskiewicz
13 is trying to portray. Mr. Kenner and Mr. Constantine are
14 not saying *but wait there's more*. They are actually
15 saying: *You are not getting this; you are getting that.*

16 And this is not an infomercial, ladies and
17 gentlemen. This is my client's life, we are talking about
18 here. This is his and his family's future. And as much
19 as Mr. Miskiewicz would like to simply crumple up the
20 authorization email and pretend it never existed, like the
21 government does with any evidence that discredits their
22 faulty view of the facts, he cannot do that and you cannot
23 do that, ladies and gentlemen, because it does exist.

24 My client disclosed every last detail of what
25 was happening before, during, and after he did it. And

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1 that shows clearly that there was no criminal intent on
2 his part. And when you crumple up this evidence, the
3 evidence the government wants to hide, that explained
4 everything in regards to what authorization and purposes
5 for the Global Settlement were, you will be able to
6 understand why the moneys were spent the way they were
7 spent.

8 That is what the government doesn't want you to
9 do. They want to keep it crumpled up and hidden
10 underneath a rock. Examine it. See what each one of
11 those hockey players were attesting to.

12 And, more importantly, what was Mr. Constantine,
13 when he was receiving this understanding, his intent in
14 terms of spending the money? Here it is. Look at it.
15 Look at the email. The conference calls. The discussions
16 about Diamanté Air. The airplanes. The Hangars. All of
17 which was disclosed during a period of about seven or
18 eight months after the money had been contributed. You
19 cannot hide it. This is evidence. This is evidence.

20 I'm going to take a look, I'm not going to go
21 through each witness, I promise you that, but I would like
22 to take a look at some of the testimony, particularly
23 Mr. Kaiser.

24 There was a portion of his testimony where you
25 recall, on direct and even on cross for a while, he said

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1 that he never called Mr. Jowdy a thief. And it took a
2 while before he was confronted with a tape in which he
3 admits, show that he had in fact accused Mr. Jowdy of
4 being a thief. And why? Because he's testifying here now
5 because he has changed sides.

6 He said, and I will put up there now and you can
7 see it.

8 *Did you ever accuse Mr. Jowdy of being a thief?*
9 *Not in those words.*

10 *Question: It is your testimony you never used*
11 *the word thief in describing Mr. Jowdy?*

12 *That's correct.*

13 *Would it be your testimony that the only reason*
14 *you thought Mr. Jowdy had stolen and misappropriated money*
15 *is because Mr. Kenner told you?*

16 *Answer: Yes.*

17 *And then this.*

18 *Question: And after listening to that taped*
19 *conversation, does it refresh your recollection that*
20 *Mr. Constantine remarks, do you know what that makes me*
21 *think about? Don't you wonder if any of that shit that*
22 *we -- and then you reply, and this is Mr. Ken Jowdy, Ken*
23 *Jowdy is a thief.*

24 *Does that refresh your recollection? And*
25 *Mr. Kaiser said yes.*

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1 All within the course of a couple of hours he
2 changes his testimony because now he is confronted with
3 something that he can't refute. So his testimony earlier,
4 which he was trying to hide the relationship with
5 Mr. Jowdy at that point, becomes disclosed.

6 Now, Mr. Haley said during his summation --
7 going to another point -- I don't know how many times I
8 heard I don't recall. Well, I'm here to tell you, ladies
9 and gentlemen, the government witnesses gave that answer,
10 in sum and substance, under cross-examination over 562
11 times.

12 Conversely, Mr. Constantine's witness had a
13 pretty darned good memory of the facts, both under direct
14 and cross, because the truth need not be rehearsed.

15 Another point I would like to clarify, another
16 mischaracterization that we have all heard the government
17 argue throughout the case, and that is that Eufora is not
18 a valuable company. You saw that repeatedly.

19 Mr. Miskiewicz put Mr. Constantine's deposition
20 transcript up on the screen where Mr. Constantine states,
21 in sum and substance, that Eufora is not worth mentioning.
22 That's because the plaintiff in that lawsuit -- which, by
23 the way, happens to be the same racy lawsuit the
24 government claims had nothing to do with Eufora -- was
25 interested in Mr. Constantine's income from the company.

Summation - LaRusso

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1 They were not asking what the company was worth.
2 They were trying to determine what if any income they
3 could potentially get their hands on by garnishing
4 Mr. Constantine's wages.

5 And since the evidence is clear that
6 Mr. Constantine did not take a salary, and since several
7 witnesses have testified that Eufora's patents are very
8 valuable, this is yet another instance where the
9 government is trying to spin a story that suits their
10 purpose, and that that is simply not true.

11 I think we can agree that if the company and its
12 patents were not worth anything, there wouldn't be much
13 interest in trying to do a hostile takeover, right? That
14 kind of explains to you the value of the company, in and
15 of itself.

16 I just want to touch briefly on the many text
17 messages between Mr. Constantine and Mr. Kenner regarding
18 Mr. Constantine's financial condition at this time and his
19 need for Mr. Kenner to send him money.

20 What those tests do not make clear is who owes
21 who money. Mr. Kenner testified it can be one way or the
22 other but the government is trying to paint a picture of
23 desperation. That again is not entirely accurate. I
24 think we can agree when one needs money and is owed that
25 money, there is just as much a sense or urgency as when

Summation - LaRusso

5947

1 one needs to borrow money.

2 I guess as the day goes on you kind of rush. I
3 want to make sure you understand the importance of these
4 topics that I'm discussing. One is that prepayment
5 penalty, that we heard mentioned both during trial and
6 during the government's summation.

7 You may recall Mr. Kenner testified that the
8 prepayment penalties, and let me kind of put it in context
9 in terms of other evidence that you heard. You may recall
10 Mr. Kenner testifying that the prepayment penalty for the
11 Lehman loan in connection with Cabo. Do you remember what
12 he said? It was \$125 million prepayment penalty on a \$125
13 mill loan. In other words, if you pay back the \$125
14 million before the due date, you have to pay \$250 million:
15 125 for the principal and 125 for the prepayment penalty.

16 The Neptune loan for Eufora. Remember some of
17 the particulars of that? That was for 2.5 million. It
18 had a \$500,000 commitment fee. So in this instance you
19 are paying a half a million dollars just to get the loan.

20 And while the government would like you to
21 believe there is something unusual or criminal going on
22 here with this prepayment penalty that Urban Expansion
23 imposed on the Lehman Waika Puna deal, it is just not
24 true.

25 You heard testimony to the contrary, that it is

Summation - LaRusso

5948

1 not an unusual practice and that there is -- that is the
2 nature of hard money lending, ladies and gentlemen. You
3 heard that from a number of witnesses.

4 And, more importantly, let's discuss the fact of
5 the prepayment personality and Urban Expansion payment
6 from Lehman. Because, like everything else in the case,
7 it would help if the government got their facts straight.

8 It comes to this. Would you go to Vegas and
9 place a bet for \$100,000 to win \$10,000? Of course not.
10 You wouldn't risk \$100,000 to make \$10,000. So in this
11 case Mr. Grdina and Mr. Constantine weren't going to risk
12 3.5 million to earn 2 or 3 monthly interest payments which
13 would amount to \$60,000 or \$70,000 until the Lehman deal
14 came through.

15 So when Mr. Miskiewicz said in his summation
16 that there was no reason for the prepayment penalty? He
17 was he wrong. There was a very good reason for it.

18 By the way, the government glazed over one very
19 important point while they had Mr. Grdina up there
20 complaining about this deal that Mr. Constantine put him
21 into. Mr. Grdina invested how much? 3.5 million? In
22 October of 2005? What did he receive? 4,800,000 just a
23 few months later as a result of this transaction. Id you
24 hear that?

25 And although this whole thing really, as

Summation - LaRusso

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1 Mr. Haley said, amounts to a civil matter as to whether
2 the 1.35 should have been put in ten days later or not, it
3 belongs in a civil court.

4 But Mr. Constantine did put in his respective
5 share of the Urban investment. It may not have been in
6 the time frame that the contract called for but he did.

7 In fact he made a \$625,000 payment to Mr. Kenner
8 in 2005 and entered into an agreement with Mr. Kenner via
9 the Palm condos for the balance. You may recall
10 Mr. Kenner testified about this. And when Mr. Kenner
11 could not close on the Palm deal, Mr. Constantine paid the
12 remaining balance of the 1.5 million in 2005. Let me
13 explain.

14 Mr. Kenner's ownership interest in the Palms
15 unit, which Mr. Kenner is testifying about, was recognized
16 by Mr. Constantine when? You guessed it: Right at the
17 time that the Urban Expansion deal was consummated. But,
18 as Mr. Kenner testified, when Mr. Jowdy didn't pay
19 Mr. Kenner back, and Mr. Kenner could not then contribute
20 the balance of the 1.5 million to Urban Expansion, what
21 did Mr. Constantine do? He paid the balance of the 1.5
22 million for the Urban Expansion deal after the Lehman deal
23 closed to ensure he and Mr. Grdina received the property.

24 You recall me going through painstakingly the
25 breakdown of those payments with the forensics accountant

Summation - LaRusso

5950

1 from the FBI and he testified that the total of those
2 amounts was 1.5 million? That wasn't emphasized. That
3 wasn't brought out.

4 One last thing, ladies and gentlemen. On the
5 Hawaiian project. And I also bring this up because it
6 shows continued type of deception and the prosecution has
7 used in this case.

8 You may recall that the prosecution's line of
9 questioning Mr. Grdina regarding the \$3.5 million loan he
10 made to the Hawaiian project, and you may recall she put
11 up the Ula Makika bank statement up on the screen and had
12 Mr. Grdina point out the \$3.5 million wire transfer into
13 the account.

14 Well, the next thing she did was show a \$330,000
15 wire which went to the Constantine Management Group and
16 the line of questioning was as follows. And the amount of
17 330 being -- and this is up on the screen.

18 *And the amount of 330 paid to Constantine*
19 *Management. Do you see that?*

20 *Answer: Yes, I do.*

21 *Question: Was there any sort of fee or other*
22 *payment associated with the \$5 million loan that Urban*
23 *Expansion was supposed to be making at or about this time?*

24 *Answer: No. Not that I'm aware of.*

25 *Question: Well, did Mr. Constantine or*

Summation - LaRusso

5951

1 *Mr. Kenner at any point indicate that there would be, in*
2 *addition to the loan that CMG would be getting, any fee or*
3 *payments wrapped up in this loan?*

4 *Answer: Mr. Kenner represented that Constantine*
5 *Management --*

6 *Mr. Miskiewicz: Well, I will withdraw the*
7 *question.*

8 *Question: At the time that you were negotiating*
9 *the Urban Expansion promissory note operating agreement,*
10 *did Mr. Constantine say anything to you about him getting*
11 *a fee at that time, 2005?*

12 *No, he did not.*

13 *Question: And how much cash can did you need to*
14 *forestall the loss of the property and stop those weekly*
15 *interest payments?*

16 *At that point we needed approximately 3.62*
17 *million, and Mr. Constantine raised 3.35 for us. I*
18 *deposited another 100,000 myself. And the remaining*
19 *balance was funded by residual monies in the Little Isle*
20 *bank account.*

21 *The implication, of course, is that Mr. Kenner*
22 *and Mr. Constantine were involved in some kind of secret*
23 *kickback of commission scheme without Grdina's knowledge.*

24 *But what the prosecution didn't show you, ladies*
25 *and gentlemen, was the \$3.612 million outbound wire*

Summation - LaRusso

5952

1 transfer for the purchase of land right after Mr. Grdina's
2 money was deposited into the account.

3 You may recall Mr. Kenner testifying that he had
4 deposited 100,000 extra dollars into Ula Makika account in
5 order to have enough to pay the 3.612 million for the
6 purchase of the land. That's the full transaction.

7 Now, I have just a few more things to say, one
8 of which is the indictment, itself.

9 Mr. Constantine is charged in Count One with
10 conspiracy to commit wire fraud, which, as the court will
11 charge, is an agreement to commit a crime.

12 And in Counts Two through Six we have actually
13 committing the crime of wire fraud. And much of the
14 summation that I gave here this afternoon was addressing
15 many of the issues in this conspiracy count so I'm not
16 going to go over that with you at this point in time.

17 And I believe that if you examine the evidence
18 closely, there really was no agreement between Mr. Kenner
19 and Mr. Constantine, or Mr. Constantine and anyone, to
20 defraud the investors. But I want to address what we call
21 the substantive counts, and that is Counts Two through
22 Six.

23 You will see in the redacted indictment the five
24 substantive counts and you will have a chance to read them
25 but I will briefly describe them.

Summation - LaRusso

5953

1 The first three, Counts Two, Three, and Four,
2 actually relate to wire transfers that are go from the
3 Gaarn sales of stock ultimately to Mr. Kaiser. I believe
4 the first one is a \$30,000 wire transfer. Then there is a
5 \$440,300 wire and then a \$25,000 wire transfer.

6 There is absolutely no evidence in the record
7 that Mr. Constantine had anything to do with the sale of
8 stock by Gaarn to Eufora, nor did he have anything to do
9 with the transfer of the money out of Eufora to Mr.
10 Gaarn's account at the Wachovia Bank.

11 The evidence is clear that he had no knowledge
12 of it. Did not participate. There is just no evidence of
13 it. There being no evidence, there can be no way
14 Mr. Constantine can be found guilty of the movement of
15 money from the Gaarn account to Mr. Kaiser, whether it was
16 a lawful payment, an unlawful payment, a diversion of
17 proceeds, whatever.

18 In the record after nine weeks of testimony
19 Mr. Constantine had nothing to do with the Gaarn
20 transactions. As a matter of fact he was publicly
21 disclosing the fact that Mr. Gaarn and Mr. Gentry were
22 behind the diversion of monies that had resulted from the
23 sale of those stocks.

24 Now, the last two, Counts Five and Six, they
25 relate to the moneys that Mr. Privitello had invested or

Summation - LaRusso

5954

1 had sent. I don't want to use the word investment. That
2 implies that it was actually accepted. Moneys that were
3 actually being sent for the purposes of investing into
4 Eufora and the Ron Richards account.

5 The first is the \$150,000 wire transfer on
6 December 7 and again the \$50,000 wire on December 7, as
7 well.

8 Well, the government in the conspiracy count
9 alleges, and I will read this to you, this is paragraph 14
10 which relates to those two counts.

11 *It was a further part of the scheme to defraud*
12 *that between November 2009 and December 2009 the*
13 *defendants Kenner and Constantine convinced Privitello to*
14 *invest money -- we know who did the convincing; it was*
15 *Mr. Kaiser -- in exchange for an ownership interest in the*
16 *company. The defendant Constantine then unlawfully*
17 *diverted certain monies for unauthorized purposes,*
18 *including for his personal benefit. That is one.*
19 *Diverted some of the monies. And then the send one: And*
20 *disavowed Privitello's ownership interest in Eufora.*

21 Now what the evidence disclosed. We know that
22 yes, his interest was disavowed. He was offered his money
23 back and he didn't want it.

24 It's about the all about the hostile takeover.
25 There is no crime here in terms of disavowing Privitello's

Summation - LaRusso

5955

1 ownership interest. The board of directors had never
2 approved that investment.

3 There is an email that was sent to Mr. Kaiser by
4 Mr. Gentry which clearly shows that his investment, which
5 he makes later on in December, we have to wait for the
6 board of directors to approve it.

7 And there is no evidence in the record, from the
8 beginning of this trial to now, to show that the board of
9 directors ever approved either Mr. Kaiser's investment at
10 the end of December or Mr. Privitello's investment in the
11 early part of December. The evidence is clear on that.

12 What happens is the hostile takeover, the
13 fighting between the parties, and the offer of the return
14 of the money and then the civil suit. They wanted the
15 company. He didn't want his money back.

16 Now, the government tried in their summation to
17 say that Mr. Gentry was put out on a leave of absence and
18 so therefore he cannot have, in his email, any authority
19 to say that it is the board of directors. Well, the
20 evidence is clear, when we played the rest of the tape
21 that yes, Mr. Constantine said he was being placed on a
22 leave of absence but he was also going to retain his
23 title. He was still going to be the COO, CAO, whatever
24 the initials are.

25 So don't be fooled by the argument that

Summation - LaRusso

5956

1 Mr. Gentry back in August of 2009 was removed from his
2 title as the officer of the company. He wasn't. He was
3 just on a leave of absence. And so that email had all the
4 authority in the company.

5 So what is the second part? So if the
6 disavowing of the interest is proper based upon the facts,
7 and there is no crime there, it's got to be diversion. So
8 what is diversion? I talked to you about that before, the
9 \$150,000 that went to AZ Avalon that was misdirected but
10 ultimately sent to Bancorp?

11 Well, that is the purpose of the money. And
12 remember, he never asked for his money back so it is being
13 spent. And when he doesn't ask for it back, remember, it
14 is carried as a loan. They don't disavow the money that
15 he gave. It's carried in the diversion agreement as a
16 loan. Short-term loan, I believe.

17 So the 150 is proper. The \$5,000 was rent. The
18 50,000 goes into Eufora bank. The only thing is that
19 \$15,000 payment. That is the diversion. That is what
20 there are claiming this man did.

21 There is no diversion there. It was authorized.
22 Remember Mr. D'Ambrosio and Mr. Kennedy's testimony in
23 regard to the civil suit that Mr. Constantine was handing
24 at the time. It related to Eufora because of the
25 subpoenas that had been served on them.

Summation - LaRusso

5957

1 There is no crime here. There is no diversion
2 with Mr. Privitello. Where does that leave us? That
3 leaves us without substantive counts. And that leaves us
4 with no venue in this district.

5 What is venue? Well, venue means, when you
6 bring the case there has to be some connection here. If
7 you take this out, there is no venue. Hawaii: That has
8 nothing to do with the Eastern District; although the
9 government will say there was telephone calls. But there
10 was no evidence about that in with regards to what the
11 substance of it was. And if there was, then you have to
12 make a determination whether that was sufficient to
13 establish venue.

14 But the important thing, ladies and gentlemen,
15 is, in reviewing the substantive counts, review them
16 first. If you want, you can do it either way you want.
17 There is no evidence that Mr. Constantine, he did not
18 commit any crime regarding Mr. Privitello, and was not
19 involved in the first three substantive counts regarding
20 the sales by Mr. Gaarn.

21 Look, I think I'm not understating it to say
22 that this can be a very complicated case. And I didn't
23 always get it right many times. And I'm sure at one point
24 or another you saw my client waiving his arms frantically
25 at me, trying to get my attention and trying to correct me

Summation - LaRusso

5958

1 because I was making mistakes either on cross-examination
2 or with documents.

3 It is a complicated case. There is no doubt
4 about it. And the government may have exploited mistakes
5 that I made. That is up to you when you are analyzing the
6 evidence, whether it was a mistake on my part or whether
7 or not the evidence does support their argument. That is
8 up to you.

9 Look there are a lot moving parts here and it
10 very difficult to follow it all and if we tried to explain
11 it all we would probably be here for another nine weeks.
12 But complicated is not wrong, and the government has had
13 many years to figure this and get it right.
14 Unfortunately, the prosecutors came into the courtroom and
15 presented an empty case against my client, devoid of
16 anything close to the facts and events as they took place.
17 Then in their closing argument they put on what can only
18 be described as cheap theatrics in terms of the use of the
19 f word and crumbling up of relevant evidence.

20 They counting on you to dislike my client's
21 lifestyle. That is what a lot of that testimony was
22 about. Perhaps his spending habits, too. But if you look
23 to the facts to support the allegations of fraud, you
24 won't find any. In fact what you will find is that the
25 truth is just a step beyond what there are willing to look

Rebuttal - Komatireddy

5959

1 for. And that is why I am going to ask you to let my
2 client go to his family and begin rebuilding his life.

3 On a personal note, I would I would like to
4 thank you in behalf of my client and Mr. Oliveras for your
5 unbelievable patience and attentiveness, especially during
6 my summation. This couldn't have been easy to sit through
7 at times.

8 More importantly, ladies and gentlemen, the
9 attention and the patience you have shown these last two
10 months. I know how difficult it has been on you and on
11 your family. And it is people like you, that are willing
12 to take seriously your civic duty, that makes our justice
13 system work and what makes this country great. And I
14 thank you for that.

15 Thank you, your Honor.

16 THE COURT: Members of the jury, you will now
17 hear the government's rebuttal summation.

18 As I told you, the government has the burden of
19 proof so they get to have a rebuttal summation, and you
20 will hear that now.

21 REBUTTAL BY GOVERNMENT

22 MS. KOMATIREDDY: That was about six hours of
23 distractions. Six hours.

24 Now, I am going to through every single one
25 because I trust that your knowledge of the case, your

Rebuttal - Komatireddy

5960

1 memory of the testimony, and your common sense can cut
2 through those, if not all of it, but there are some things
3 I have to go through.

4 So I promise I will finish before the end of the
5 day, hopefully earlier, but here we go.

6 First, let's start with Mr. Privitello.
7 Mr. Kenner argues that he had nothing to do with Counts
8 Five and Six. He argues that he had nothing to do with
9 the Privitello investment from Eufora. And his argument
10 is, well, if Kenner had some to do with Privitello,
11 Privitello would have sued Kenner in some lawsuit that
12 happened a year later with a different lawyer and a
13 different group of investors.

14 Ladies and gentlemen, you heard a lot of
15 testimony about lawsuits and civil cases and arbitrations.
16 You have heard about how lawsuits get dismissed for all
17 kinds of reasons including venue and jurisdiction.

18 It is not for you to speculate about why
19 Mr. Kenner wasn't named in some lawsuit. There can be all
20 sorts of reasons for that. That attorney didn't come in
21 and testify. Neither side called him. Both sides had the
22 opportunity to subpoena witnesses. I know the defense has
23 no burden but they had the opportunity. That is not
24 evidence that is before you.

25 Here is the evidence that is before you. And

Rebuttal - Komatireddy

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1 here is the evidence that Mr. Haley ignored when he told
2 you that his client had nothing to do with
3 Mr. Privitello's investment in Eufora.

4 You heard the testimony of Mr. Privitello. You
5 heard him tell you how Kenner told him about himself,
6 about his background. And it was impressive. You heard
7 him tell a story. The guy heard a story. It made an
8 impression about a cabana party and it made him think:
9 Hey, this is a guy with money who has made it. Maybe I
10 should listen to him when it comes to investments.

11 Mr. Privitello testified that it was Kenner who
12 told him about Metabank. Now, there is no reason to think
13 that Mr. Privitello saw that text message that explicitly
14 said Metabank. That is a text message between Kenner and
15 Constantine. There is no reason to think that he was
16 tailoring his testimony, but his testimony is corroborated
17 by that text message. It was Mr. Privitello who said at
18 1431 that Kenner told him that Metabank was a big bank, a
19 heavy hitter that did a lot of business and would bring
20 quite a bit of revenue into Eufora.

21 He remembers specifically, specifically, what
22 Kenner told him. And he told you why that conversation
23 with Kenner was important. He told you it was important
24 to him because, quote, this guy was a successful guy and
25 that was valuable. His verification. The fact that

Rebuttal - Komatireddy

5962

1 Kenner, a successful guy, validated this investment was
2 important to Privitello.

3 And he told you when that conversation happened.
4 Not years beforehand when he first met Kenner. He said
5 late 2009. Late 2009. November, December 2009. You can
6 infer that those two things match up.

7 Now, it was Mr. Kenner who set up Mr. Privitello
8 with the defendant Constantine. And you saw the text
9 message. The text message that you saw is on screen
10 again, Exhibit 7456, where Kenner and Constantine tell you
11 exactly how they are going to sell Privitello on the
12 investment.

13 And it is all there. I'm not going to read it.
14 That is not my style. You can read it. And it tells you
15 in vulgar terms that they are basically going to, well,
16 they are going to defraud Mr. Privitello by selling him
17 using this Metabank line. And you can read it for
18 yourself. That is 7456.

19 Now, Mr. Privitello's testimony and the text
20 messages and the timing of his wire transfers are all also
21 corroborated by the email conversation that you all saw,
22 Government Exhibit 208.1 through 208.11, a series of
23 emails where every email in the chain came into evidence.
24 You saw it go back and forth.

25 And who was that email conversation between? It

Rebuttal - Komatireddy

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1 was between Mr. Constantine and Mr. Privitello.

2 So when Mr. LaRusso gets up here and tells you
3 that his client had nothing to do with the representations
4 in this case, he is lying. It is contrary to the
5 evidence.

6 That email conversation shows you that it is
7 Mr. Constantine who says if Mr. Privitello invests
8 \$200,000, he will get a 1.5 percent interest in Eufora.
9 It his in black and white. It is in the email.

10 And you can tell that Nick Privitello, Nervous
11 Nick, is a little nervous about the investment because he
12 told you that that the \$200,000 was his life savings.
13 That was a huge investment for him. He is an electrician
14 here on Long Island. The only reason he was making that
15 kind of investment was because he and his wife were hoping
16 to be able to have a situation where she could stay at
17 home with their new child. It was a big deal.

18 So he got it in writing. He got it in an email,
19 not with this buddy John Kaiser but with his buddy, Tommy
20 Constantine. He made sure he communicated directly with
21 Tommy Constantine. He told you he remembers being on the
22 phone with Tommy Constantine, running around from one bank
23 to another, talking to him in the parking lot because he
24 had to make two wire transfers, 150K and 50K adding up to
25 \$200,000, to make that investment.

Rebuttal - Komatireddy

5964

1 He told you all the details. Mr. Privitello was
2 on the stand for hours and he told you all of those
3 details. This was a major investment in his life.

4 And what did the defendants do? They ripped him
5 off. They gave him excuses. And they are continuing to
6 give excuses now.

7 Constantine claims he wasn't the one talking to
8 Mr. Privitello. But like I said. Look at the email. It
9 shows that is not true.

10 It is Constantine who says, when Mr. Privitello
11 asks, if you agree, should I send it to the attorney's
12 account like in the previous email? Referring to the
13 attorney account wire information at the bottom of the
14 email. Ronald Richards. First Century Bank.

15 It is Mr. Constantine who says that would be
16 fine. Best, actually.

17 It is Mr. Constantine who knows exactly how much
18 money is coming, exactly what it is for, exactly who it is
19 coming through, the Ron Richards account. But he runs it
20 through that Ron Richards account because he is intending
21 to defraud Mr. Privitello; because that is one more way he
22 can have an excuse later on to say: I didn't know who it
23 was from. I didn't get it directly. I had this other
24 lawyer. You know, what can I tell? That's evidence of
25 intent to defraud.

Rebuttal - Komatireddy

5965

1 And then he blames his CEO. Look at the email.
2 Tommy Constantine signs off, CEO. He doesn't say in that
3 email when he is actually getting the money. Well,
4 actually, you know what? I need approve for this. I
5 can't give you five percent right away. I need to get
6 some lender to sign off. I need to get a different board
7 to sign off.

8 No, no. He needs the money urgently. He is
9 happy to take it as soon as possible. He is happy to have
10 this poor guy here on Long Island run around to different
11 banks to wire over his life savings and then give the
12 excuses later. Tell them later actually I need approval.
13 Tell them later, well, you know what? Six years later I'm
14 putting it as a loan on Eufora's books.

15 It is disingenuous. It is totally disingenuous.
16 And you know it is disingenuous because of
17 Mr. Constantine's own words, because in that phone call he
18 says one thing and then he says another. First he says:
19 *How could I tell? I didn't know it was your money coming*
20 *in.* And then in another clip we played, we played you
21 several clips, he says: *I knew exactly how much money*
22 *came in.*

23 First he says: *Why didn't you take it back*
24 *before we spent it?* But you saw the bank records. They
25 spent it immediately. They spent it that day and the next

Rebuttal - Komatireddy

5966

day. December 7 and December 8. Totally disingenuous.

(Continued on the next page.)

1 MS. KOMATIREDDY: And if there's any doubt, if
2 there's any doubt about what he meant and what he intended,
3 look at what Mr. Constantine says on the Home Depot tape about
4 this transaction. He says about the suits (reading):

5 "There's no way I'm coming. What would you do if
6 somebody said, Come to Idaho. You raped this girl, come to
7 Idaho and deal with it right now? How fast would you go to
8 Idaho? You'd say" -- I apologize for the language -- "you'd
9 say fuck you, right? That's pretty much what I did. I'm not
10 going to come to somewhere in New York because some guy that
11 represents some guy who supposedly represents these guys is
12 telling me you better come here or else. I'm not fucking
13 taking it."

14 If there's any doubt about what that F-you, who that
15 F-you is meant for, it's clarified by the Home Depot tape.
16 It's right there. And you can listen to it.

17 And about the use of the money, Mr. LaRusso shows
18 you an e-mail marked C-72. Privitello tells the investors he
19 needs the bank for Bank Corp and Neptune. Bank Corp and
20 Neptune. Mr. LaRusso says that e-mail could not have been
21 more upfront. Actually, it could have. It could have said, I
22 need the money for a personal race car suit for my lawyer,
23 Patrick Gonya, of the law firm Carey Rodriguez & Greenberg.
24 And I need that money quick because I'm behind on those bills
25 too, as you know from his deposition in that case.

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1 It could have been absolutely upfront. He sends an
2 e-mail about the use of the funds and he omits his personal
3 expense. That's consciousness of guilt. That's intent to
4 defraud. That's how you know it's wrong. That's how you know
5 he meant it. That e-mail says nothing about the patent of
6 Eufora being pledged.

7 And why is that relevant? Because it is the
8 relevant time frame. Look at the patent agreement. It's
9 dated February of 2009. Mr. Privitello's investment, December
10 2009. And Mr. Privitello came up here and told you if he knew
11 the patent, the only value the company had, has been pledged
12 as collateral, he never would have invested. But
13 Mr. Constantine left that out too. He leaves it out. That's
14 immaterial omission.

15 They were desperate for money. They had a lender on
16 their back. And they went wherever they could for that money.
17 Kenner and Constantine were in on it. Remember, this is 2009.
18 Kenner and Constantine had been working together since 2002,
19 at least.

20 The Eufora operating agreement shows you that.
21 Because in 2002, it's the first operating agreement of the
22 company. Tommy Constantine founded the company, Phil Kenner
23 is listed as secretary. Over those seven years, they've
24 gotten money from all kinds of hockey players for all kind of
25 reasons. Mr. Privitello is the last investor. They've done

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1 this before. They're doing it again with him. And they're
2 doing it together. They're doing it because they need the
3 money. You can find them both guilty of Count Five and Six.

4 You know, one thing that's really striking -- I'll
5 say one more thing about Mr. Privitello. One thing that's
6 really striking is how the defendants treat him in contrast to
7 Sergei Gonchar. You know this -- I went over an e-mail with
8 Mr. Gonchar that's dated August 2009. Mr. Constantine tells
9 Mr. Gonchar that he needs money for Eufora. He says, "If you
10 put in \$750,000 you'll get 3 percent of the company." No
11 contingencies. No board approval. No lender requirement.
12 You will get 3 percent of the company. Gonchar gives him the
13 money. Constantine tells him, You have 3 percent. That's it.

14 What's the difference? Gonchar is a hockey player
15 who make \$50 million over the course of his career. He's the
16 gift that keeps on giving. He's someone that Constantine
17 needs to keep around. He's the one guy who seems to let
18 Constantine use his money for whatever he please. So he's
19 nice to Gonchar. He wants to keep him on his good side and he
20 doesn't make any excuses.

21 Nick Privitello is a guy out here in Long Island.
22 Who, even when he sued, even when he tried to get answers, he
23 can't get Tommy Constantine to come over here and answer him.
24 Nick Privitello is someone who just invested his life savings.
25 There's no more money back there. He's someone the defendant

1 can say F-you to and walk away, or he thought he could.

2 Now let's talk about the other Eufora fraud and what
3 the defendants call "selling shares." They've told you that
4 there is no impropriety in them getting money from the hockey
5 players in 2008 and 2009. Because after all, they were just
6 selling their shares in Eufora. What's wrong with that?

7 Here's what's wrong with that. First of all,
8 whether or not they are selling shares is entirely irrelevant
9 because they didn't disclose it to the players. The fraud is
10 complete when you lie to someone to get their money. That's
11 fraud.

12 And what did they tell the hockey players? They
13 told them -- and the hockey players are specific about it.
14 They told them that Eufora was a great company and that the
15 company needed a little bit more money to get off the ground;
16 to explode; to get things going.

17 The defense quoted from Mr. Sydor, and they quoted
18 from the part of his testimony when he was on a golf course
19 investing in Eufora in '03 and '04. They entirely ignored the
20 part of Mr. Sydor's testimony where he's actually talking
21 about investment charges in the indictment, the 2008
22 investment in Eufora.

23 When he's asked -- Mr. Sydor, at 2171 is asked,
24 "What did he" -- meaning Kenner -- "say the money was going to
25 be used for?"

1 Mr. Sydor answered, "You know, get it over the hump
2 and get everything finalized in production, and get it out
3 there for everybody to use and to make money." Referring to
4 the prepaid credit cards.

5 "QUESTION: Now, at the time that you invested in
6 Eufora, did the defendant say anything to you about your money
7 being used to buy out other investors?

8 ANSWER: No.

9 QUESTION: To buy out Tommy Constantine?

10 ANSWER: No.

11 QUESTION: To buy out Phil Kenner?

12 ANSWER: No.

13 QUESTION: Would that have been important to you in
14 deciding whether to give money to Eufora?

15 ANSWER: Yes.

16 QUESTION: Why?"

17 He explains, "I would have asked a lot of questions
18 about what's going on here."

19 Everyday in this country small companies raise
20 capital by telling investors that they need more money to get
21 off the ground, telling them that their money is going to be
22 used for the business and giving those investors a share in
23 the company. That's what these investors expected.

24 And it wasn't just Mr. Sydor. The Pecas told you
25 the same thing. When asked what she was told about how the

1 money would be used, Kristin Peca said, "Our money was to be
2 used on just some last minute filing of paperwork and legal
3 work because they had to be ready to go with the bank and they
4 just needed to cover these last few costs to get everything
5 going."

6 She was specific. Did anyone tell her that they
7 would be buying out someone's shares in the company? "No,
8 never."

9 Nash said what he was told was Eufora, at 1913,
10 "needed money for -- I believe they were doing some
11 commercials." And then he told you that afterwards, after he
12 invested and wanted to check up on the investment -- remember,
13 Tyson Nash lives in the same hometown as these guys. He lives
14 in Arizona. He swung by Eufora's offices and he said
15 Constantine was excited to show me the commercials that were
16 made, that were in production, and I was impressed. He
17 remembers that.

18 So Mr. LaRusso made some comment about how the
19 hangar offices were under construction. But you saw the
20 photos. These guys weren't working out of their homes.
21 Before they moved into the offices in the hangar, they had
22 another office building. And Mr. Nash remembers seeing the
23 commercials.

24 Think to yourself when you're evaluating someone's
25 credibility, is that the kind of thing someone would make up?

1 You can evaluate the demeanor, you can evaluate the level of
2 detail he gave you, you can evaluate how excited he was on the
3 witness stand when he told you how excited he was to invest in
4 Eufora. He wanted to get in on it. He was told he would be
5 the last one in the door. He was told they just needed the
6 money for some last costs for the business.

7 And he, too, was specific about whether he was told
8 whether anybody was selling their shares to him. He said no.
9 The question was (reading):

10 "QUESTION: Did the defendant say anything about
11 your money being use told to buy out other people's shares in
12 Eufora?

13 ANSWER: No, I didn't. Again, I was under the
14 understanding that the money was going to be used for some
15 upcoming commercials, to finish up.

16 QUESTION: Did they say anything about your money
17 being used to buy out Constantine's share of the company?

18 ANSWER: No.

19 QUESTION: Would that have been important to you?

20 ANSWER: Considering the guy running Eufora, I would
21 have been quite concerned if he's getting out and I'm getting
22 in, yes."

23 Rucchin said the same thing. His understanding was
24 the money was going to Eufora and into the company itself. He
25 had no understanding he'd be buying out shares of any other

1 investors. In fact, when asked, "Would that have been
2 important to you? He said, "It would have been very
3 important." (Reading):

4 "QUESTION: Why?

5 ANSWER: I wouldn't have done it."

6 I wouldn't have done it. Here's the thing. It's a
7 natural response. The founder of the company is selling his
8 shares, your financial advisor is selling his shares. If even
9 one of those things are respect true, it would cause you to
10 pause. It would cause you to stop and say, wait a minute,
11 maybe I shouldn't invest in this company. That's something
12 the defendants knew when they went out there to pitch the
13 investments. That's why they didn't tell the investors. They
14 omitted a material fact. It's completely irrelevant whether
15 they were selling shares or not. They lied to get people's
16 money. That's the crime. That's the fraud. And on that
17 alone you can find them guilty.

18 But for a moment, let's consider their claim. Let's
19 consider whether there's any basis to think Constantine was
20 selling a share in Eufora. Well, he wasn't selling any
21 personal share in his own name, because the evidence has shown
22 you he had no personal shares. In Government Exhibit 8012,
23 Constantine states he transferred his personal interest in
24 Eufora to a woman named Sue Ellen Ferguson in the name of 2002
25 Trust, and he made that transfer in April of 2003.

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1 In 2008, there were no shares in Eufora in Tommy
2 Constantine's name. So that's out the door.

3 What about this notion that Constantine was selling
4 stock in the name of Constantine Management Group, the
5 alterego company. There's no evidence of that either.
6 There's no evidence in the record that he was selling shares
7 of Constantine Management Group. None of the investors told
8 you that they were told that. Even Mr. Kenner didn't say
9 that.

10 What did Mr. LaRusso tell you? He showed you two
11 transfer documents, C-266 and C-267. These are transfers from
12 Dan Kennedy's company, K9 Consulting, to two other entities.
13 One was the Eufora Partners and one was Constantine Management
14 Group. If these are so legit, where's the transfer document
15 from Constantine Management Group to the players? Where's the
16 transfer document from 2008. There is no transfer from 2008.

17 There's one transfer document that you have seen.
18 That's Government Exhibit 764. You might remember this. It's
19 a picture of the transfer document with Tyson Nash. This is
20 the only documentation that he has in Eufora investment. He
21 kept the original.

22 So he took a photo and he sent it. And he told you
23 how he got this. He didn't get it in 2008. After years of
24 getting no documentation in the Eufora investment, Tyson Nash
25 called up Constantine, hounded him -- remember, they're in the

1 same town -- and pressured him to give him something. And he
2 went by the offices and Constantine, in 2012, printed this up,
3 signed it, backdated it to April 2008 and said, Here you go.
4 Here's your proof of interest. No amended operating
5 agreement. No calls to the board. No approval from the
6 lenders. One piece of paper.

7 Now, let's just consider for a moment whether these
8 transfer documents mean anything. I submit to you that they
9 mean nothing. I'll tell you why. Because Dan Kennedy, what
10 did he come in here and testify to? Here's a guy who says he
11 signed these two things, and his interest went from 10 percent
12 to 8 percent. And then 8 percent to 4 percent.

13 He didn't remember the documents specifically. But
14 he said, If you show them to me, I'll agree that's probably
15 what I signed. And he said he remembers dropping by the
16 office when Tommy Constantine wasn't there to get them signed
17 and get out of there.

18 These documents mean nothing. You know how they
19 mean nothing? Why they mean nothing? Because when you look
20 at the few Eufora corporate records that we do have, you will
21 see in Government Exhibit 4729 and 4730, documents that show
22 all of the percentages where they actually add up to 100, you
23 will see in those documents that Dan Kennedy would just guess
24 what his share of Eufora was in those documents. It's not
25 ten, it's not eight, it's not four. It's none.

1 These transfer documents are not worth the paper
2 they're written on. It's part of the scam. Constantine makes
3 up whatever number he needs to accommodate his latest lie.
4 And in 2012 he prints something out and gives to Tyson Nash so
5 Nash would keep bugging him. They're not worth anything.

6 And Dan Kennedy. Dan Kennedy is a guy who comes in
7 here and basically tells you that Eufora was a sinking ship,
8 he wanted to bail, and he came by the office and signed
9 whatever Constantine wanted him to sign. He said there was a
10 lot of tension. He pushed Eufora out of his mind. He was
11 frustrated. He had enough. And in his words, there was no
12 upside to being a suretor. So he signed the documents and he
13 got out of there. What Tommy Constantine did with them,
14 they're just a cover for his fraud. They're meaningless.

15 Now, one of the things to note about this first
16 phase of the Eufora fraud, the 2008 phase, when you see the
17 money going to Constantine Management Group. Mr. Haley
18 critiqued the government. He said, you know what, they showed
19 you this \$100,000 going in from Michael Peca and another
20 \$100,000 going out to Mr. Kenner, but they didn't work their
21 way up the bank record to show you that, actually, Mr. Kenner
22 had put in \$100,000 earlier.

23 You have all the bank records, and they're all
24 organized in the binders. You can look at them. I'll tell
25 you what you find. When you look, work your way up the bank

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1 record, and you consider what Mr. Kenner told you, he told you
2 he would advance Constantine some money to pay various
3 expenses, sometimes for the hangars that they both were on the
4 hook for, sometimes for Playboy that Mr. Constantine is on the
5 hook for. Then when Mr. Constantine got this money from
6 Eufora, he will pay Kenner back.

7 Let's think about that for a moment. That's more
8 evidence of fraud. That shows you, it's perhaps the best
9 example that shows you how these two worked together.

10 Mr. Constantine -- I'll give you have an example of
11 Mr. Peca. Mr. Peca's April 2008 investment. If you look at
12 that bank record, April 2nd, Mr. Constantine has a Playboy
13 bill there. So Kenner sends him \$100,000. Look at
14 Constantine Management Group bank account, you see it come in,
15 Phil Kenner, \$100,000. Next day it goes right out to Playboy.

16 Now Kenner wants his money back. So what does he
17 do? He goes to the Pecas. He tells them Eufora is a great
18 investment. But you know what, it only needs a little bit
19 more money. So I'm only offering this to my most loyal
20 clients, my long-time clients. Remember the testimony from
21 Kristin Peca? She said he presented it to us as if he was
22 doing us a favor, and he pressures them to invest in Eufora.
23 They say okay, and then he signs the wire transfer record.

24 You saw those wire transfer records. They're signed
25 by Phil Kenner, attorney in fact for Michael Peca. The money

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1 is going to Constantine Management Group, not Eufora. And when
2 we asked the Pecas, did you know the money was going there?
3 They said no. And Michael actually testified, he said later,
4 when I got this document from the bank, I asked him why it
5 went to Constantine Management Group. He said, Phil told me
6 not to worry about it, it wasn't important. They were told
7 the money would go to Eufora. Kenner signed that wire
8 transfer. Sent it straight to Constantine, and Constantine
9 sent that hundred grand back to Kenner. They both get paid.
10 That's the cycle of fraud. That's the two of them working
11 together.

12 And it happens again. It happens again with Nash.
13 Before Nash's investment of April 17th, Kenner sends
14 Constantine \$25,000. The defense made a big point of that.
15 You see \$25,000 coming in. Sure. Okay, \$25,000 comes in.
16 And then Kenner goes to Nash and says, You've got to get in on
17 Eufora. You're going to be the last one in the door, which we
18 know is a lie because plenty of players get in after that.
19 Sydor gets in after that.

20 He tells Nash, you're going to be the last one in
21 the door. You've got to invest. Nash invests. He tells Nash
22 the money is going to be used for the company. Nash invests.
23 And again, Kenner sends that wire transfer. He signs it.
24 Nash testified he didn't know the money was going to
25 Constantine Management Group. Phil Kenner signs as attorney

1 in fact for Tyson Nash, trustee for the Nash Trust.

2 The money goes to Constantine Management Group so
3 Kenner gets paid back and Constantine pays his own expenses.
4 You saw the text message that matches up perfectly to each one
5 of those expenses. The same thing happens again with Sydor
6 and Ranford.

7 If you look at the book of text messages, you'll see
8 that there are two right before that. They say, "Listen, can
9 you get me another 200K in the next few days? That's
10 Constantine to Kenner. Then Kenner goes out and pressures his
11 clients, pressures them to, quote, "invest in Eufora." He's
12 actually taking that money for himself and his criminal
13 partner, Tommy Constantine.

14 Now, to find a conspiracy in this case, you only
15 have to find that conspiracy, that meeting of the minds as to
16 least one object of the conspiracy. I submit to you that you
17 can find that the two of them were defrauding investors,
18 working together. Kenner, by having access to the money and
19 pressuring his clients; Constantine, by using the cover of
20 Eufora, a promising company, as a cover for fraud. That, in
21 itself, there's a conspiracy. You can find them both guilty
22 of Count One.

23 Now, Mr. Haley suggested for a moment that, you know
24 what, Eufora was a real company. It's not like it was a sham
25 company, it was a real company. And Hawaii was real state

1 with real land. The government never tried to suggest that
2 there wasn't some real possible investment underneath. Every
3 good fraud has some truth to it. Eufora was a real company.
4 And you saw the frantic e-mail from the VP of operations, Mia
5 Edrozo, saying, "We need money. The operating balance is
6 negative. When is the money coming in?" That e-mail, that
7 series of e-mails, you will see Constantine and Kenner on the
8 e-mails.

9 You will see even from inside Eufora, the
10 expectation that the money that Kenner was going to raise was
11 going to go to the company. But Kenner didn't send it there.
12 Constantine responded to Mia Edrozo by saying, "No mas;" no
13 more money. The company was suffering.

14 The investors wanted to support, they wanted it to
15 succeed. But Kenner and Constantine are the reasons, not the
16 FBI, not anybody else, Kenner and Constantine are the reason
17 that company was limping along in 2008. They're the reasons
18 Mark D'Ambrosio came in here and told you he has no title and
19 the company is not really operational anymore, because they
20 were using it as a cover for fraud.

21 Now, that's the 2008 series of investments in
22 Eufora. Then we get to 2009. 2008, Constantine's broke.
23 He's using Eufora to cash out. In 2009, it's Kenner's turn.
24 You'll see a text right near the end of 2009 where Kenner say,
25 "Wells Fargo has cut me off." You'll see that his bank

1 account changes from Wells Fargo to Bank of America. All
2 those records are in the binders for you. And you'll see that
3 it was his time to cash out.

4 Mr. Haley said, you know, you can't just take a
5 snapshot of someone's bank account and say it's fraud.
6 Actually, with this one you can take a snapshot, and I'll tell
7 you why. Special Agent Wayne and Forensic Accountant
8 Petrellese told you why. Because when you look at that bank
9 account, the balance is zero or negative before the investors'
10 money comes in. Kenner is broke. He is entirely living off
11 of his clients' money. He's entirely living off of his fraud.
12 That's why you can take a snapshot, because there's no other
13 money coming in.

14 So it's Kenner's turn to cash in. He sends
15 Constantine a version of shopping list saying, listen, you've
16 got all this money, it's my turn. That's the implication
17 there, that text message that lists all the expenses
18 Constantine has been able to pay off over the last year.
19 Kenner decides to use his friend Gaarn and siphon the money
20 off his list.

21 Now, Mr. LaRusso wants to insist that Constantine
22 had nothing to do with the aspect, the 2009 aspect, the Eufora
23 fraud. He has everything to do with it. It's his company.
24 Eufora is his company. He knows everything about what's going
25 on in that company, and he tells you so. Because in that call

1 with Nick Privitello when he's busy arguing some other
2 argument, he says, just as Mr. LaRusso just said in his
3 closing statement, all the money that goes into Eufora I know
4 about. The hockey players' money went into Eufora. Listen to
5 Government Exhibit 503.1, "I know exactly how much they put in
6 it." That's what Constantine said. All the money that goes
7 into the Eufora bank account, he knows exactly how much money
8 they put in.

9 They were both in on the Gaarn fraud. The other way
10 you know that, there was the money. Kenner was the one
11 raising the money. Constantine saw it come through his
12 company account. The other way you know that it is Kenner.
13 Kenner testified that he created a transfer document, one more
14 of those useless transfer documents, and backdated it.

15 Gaarn testified to the same effect. He said yes, he
16 have backdated it December 2008, but the document actually
17 says that the transfer of shares happened in January 2005.
18 That was part of the cover-up.

19 Constantine backdated documents too. In Government
20 Exhibit 4728, in Eufora's corporate records, a record he
21 signed in 2009. He backdates that same transfer. He says
22 that transfer happened in 2005. They're perfectly in sync and
23 they both get proceeds of the fraud.

24 Now, why is that important? Mr. LaRusso says a lot
25 of people get the proceeds. John Kaiser, Michael Peca. And

1 he's hoping that you might confused when you have some victims
2 getting proceeds of the fraud too, but everything has an
3 explanation.

4 John Kaiser told you, and Phil Kenner told you, that
5 he was working on some other projects, construction projects
6 at the time. Paradise Valley, Hermosa Beach, other
7 construction sites. The judge instructed you that those
8 particular projects are not relevant except as background for
9 why he's getting paid. And we submit that's why he's getting
10 paid. Mr. Kaiser had legitimate construction expenses.

11 And when you look at the transfers, you have to pull
12 bank records, they're small amounts for construction expenses.
13 He also testified that he has expense receipts for all of
14 that, and he kept track of them.

15 Mr. Peca also testified about why he's getting
16 money. The Pecas told you that they different investments
17 with Mr. Kenner. Remember, there's a lot of investments they
18 do have together. In that different investment, Mr. Peca was
19 invested in a particular condo with Mr. Kenner where the deal
20 was Mr. Peca would put down the down payment, put the mortgage
21 in his name, Mr. Kenner would pay the mortgage. Here's
22 Mr. Kenner paying the mortgage. You have in evidence the loan
23 documents for the other loan, and it matches up. All those
24 payments are accounted for.

25 It actually makes the fraud work, right? Because

1 here you have Kenner and Constantine stealing from hockey
2 players to pay off one of Kenner's other clients for another
3 deal that he's supposed to be paying with his money.

4 Kenner's paying all kinds of expenses. That's where
5 the Peca's money came from. What about Constantine?

6 Mr. LaRusso said that Constantine didn't know who was
7 directing the money, that he didn't know how he was getting
8 paid from that money, but you have evidence that showed the
9 contrary.

10 Look at the text messages, Government Exhibit 7448
11 and 7449. I'm going to show this to you. You'll see Kenner
12 and Constantine specifically talking about their expenses.
13 You will see that Constantine says in February of 2009,
14 "Anyway to get Tom something small, like \$5,000, 5K, from
15 Moreau? He says he won't do it until I pay for previous gig,
16 which is 20K."

17 Now, you know who Tom because Constantine tells you
18 in his deposition. He says Tom is Tom Baker, his personal
19 attorney. Bill Ranford told you that too, he knows who Tom
20 Baker is.

21 Look at 7449. Kenner asks, "Did Baker file the
22 Moreau response?"

23 Constantine says, "No. I talked to him and he wants
24 5K. I told him we're supposed to call him about it. And he
25 said he's had it.

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1 Kenner says, "The money will be there Monday. I did
2 talk to him in person."

3 And look at where the money goes. Steve Rucchin's
4 money, supposed to go Eufora, goes to Gaarn, goes to pay Tom.
5 Constantine knew exactly who was directing that money, he knew
6 exactly how he was getting his expenses paid. Those two were
7 in a criminal partnership. They've been in a criminal
8 partnership for years. They've used Eufora as their cover for
9 years. This was just one more time.

10 THE COURT: Why don't we take the afternoon break, a
11 15-minute break. Don't discuss the case.

12 (Whereupon the jury leaves the courtroom at 3:50
13 p.m.)

14 THE COURT: You have about 30 minutes left.

15 MS. KOMATIREDDY: Thank you, sir.

16 (Whereupon a recess was taken.)

17 (Continued on the next page.)
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1 THE COURT: Let's bring the jury in.

2 (The jury enters the courtroom.)

3 THE COURT: Please be seated.

4 MS. KOMATIREDDY: A few final notes on Eufora.

5 Mr. LaRusso made a couple of comments on how Constantine
6 over the years put his own money into Eufora, that he had
7 done good things and helped it out with some of his racing
8 sponsors. All of that is irrelevant.

9 In 2008, Eufora was hurting. In 2008, you have
10 the e-mails from the VP of operations showing you that the
11 company doesn't have money. But in 2008 Constantine is
12 also hurting. His text messages say: I'm broke, broke,
13 broke. And so he put himself first and took the money for
14 himself. What he did in the years past really doesn't
15 matter.

16 Now, to try and make it better, the defendants,
17 at least both of them, say in one way or another, well, at
18 least the investors have a share. Now, remember that the
19 defendants have no burden in this case. They can sit
20 there silently. They don't have to do a thing. They can
21 hold us, the government, to our burden. That's okay.
22 When they do put on case, you are permitted to evaluate
23 that case. You are permitted to evaluate its strengths
24 and weaknesses, whether it has any credibility.

25 And here, you have got two exhibits. Mr. Haley

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1 gives you Kenner 228, a spread sheet, which he tells you,
2 as the judge told you, you cannot consider for its truth,
3 only for Mr. Kenner's mindset. So this isn't actually
4 proof that the investors have shares in Eufora.

5 And as far as Mr. Kenner's mindset, apparently
6 his mindset is that this is not -- needs further checking
7 to ensure this is correct, I did not have complete records
8 on this and it must be thoroughly reviewed again.

9 This is proof of nothing. It's a spread sheet.
10 If you check the spread sheet against the various
11 operating agreements we went through with Mr. D'Ambrosio,
12 the numbers don't match.

13 Then Mr. Constantine's attorney gives you this
14 PowerPoint slide, C279. He calls Mr. D'Ambrosio to the
15 stand who tells you that this is true and accurate
16 according to his memory but he didn't create it. It's not
17 a record of the company. Mr. LaRusso created it. And
18 what did he check it against? Nothing. He did it based
19 on his memory. He said: I didn't go back yesterday to
20 Arizona. So he got this the day before he testified? He
21 checked it against nothing? There is no binder. There is
22 no backup. There is no operating agreement. There is not
23 even the phony transfer of membership interest documents
24 to back this up. It's a PowerPoint slide. Millions of
25 dollars go into Eufora and this is what they come up with.

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1 File this with your taxes. Give this to all the hockey
2 player investors. It's ridiculous.

3 The worst part is Mr. D'Ambrosio after being on
4 the stand about 30 minutes realizes, wait a minute, this
5 isn't accurate. Wait. CR Gentry is missing. They never
6 put it on the slide. If they had, it would have had to
7 add up to 100. When he realized someone was missing, it
8 wouldn't add up... This is also garbage.

9 Now, both defense attorneys lodged serious
10 charges about the government's motivation in this case.
11 And they said -- Mr. Haley said the government has
12 orchestrated charges against my client and they have the
13 motive to do it. There is no evidence of that. That is a
14 very serious charge. It's a very serious charge.

15 But look at the evidence. What motive? What
16 did the government orchestrate? You have in evidence bank
17 records. The government didn't create the bank records.
18 They are stipulated in evidence as true and accurate
19 records of the banks.

20 You have in evidence title records for all the
21 lendings and deeds from all the accountings. You have
22 black and white, reliable evidence that the government
23 didn't create.

24 You saw what Special Agent Wayne did. He
25 followed the money. If you follow the money, you will

5990

1 find that it points to Kenner and Constantine and that's
2 it. No motive. No conspiracy.

3 A charge of conspiracy is so ridiculous, Mr.
4 Kenner couldn't bring himself to say it on the stand. He
5 couldn't say it out loud because there is no evidence of
6 it.

7 Since they can't prove conspiracy, they allege
8 government misconduct because of a lack of investigation.
9 Mr. LaRusso gave you various examples. First he says, you
10 know what, Baja Development Corporation, on that chart,
11 but there is some sort of misconduct; you don't know what
12 the money was for. You know exactly what the money was
13 for. In fact, Mr. LaRusso, when the first witness got on
14 the stand, one of his first exhibits he offered into
15 evidence was a record of the Baja Development Corporation.
16 Those records are in evidence.

17 Mr. Kenner told you that he used that money to
18 get his piece in the Mexico investment with Ken Jowdy.
19 You know exactly what that's for. That's in evidence.
20 Mr. LaRusso knows exactly what it's for too.

21 He said the government told you -- suggested
22 that Mr. Constantine was paying some sort of kickback to
23 Eric Edenholm because of the house that Eric Edenholm
24 bought from Mr. Constantine. The allegation was not a
25 kickback. The government gave you evidence that

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1 Mr. Constantine was paying Mr. Edenholm rent. We put that
2 into evidence on the direct testimony and we put in
3 evidence that rent came from the Global Settlement Fund.
4 You had the transactions. And on cross they introduced a
5 lease agreement. Okay. And somehow this has become a
6 great example of government misconduct when we are asked
7 for the last page of an exhibit? That was a cheap shot.
8 The defense provides an incomplete exhibit to the
9 government, then they are surprised we object and ask for
10 more?

11 If I went through all the mistakes Mr. LaRusso
12 went into in this trial, it would take me longer than 30
13 minutes but I'm not going to do it. I'm going to stick to
14 the facts.

15 Mr. Haley told you -- one of the first things he
16 told you, he talked about the notes. Let's get the notes
17 out of the way.

18 He said the most important defense document in
19 the case, Kenner 43, is a document reflecting notes of an
20 interview with Mr. Kaiser. That's interesting. I thought
21 the most important document in the case for them was the
22 supposed loan to Ken Jowdy. Let's take their word for it;
23 notes of an interview with Mr. Kaiser.

24 And then they allege that the government sat
25 silently by while Mr. Kaiser testified. That's not true.

5992

1 The very exhibit they showed you, Kenner 43, was
2 stipulated into evidence by the government so you could
3 see what it is and what it isn't.

4 What is it? It's the notes of an investigator
5 from another office, not the notes of an FBI agent, an
6 investigator from another office. What is it not? It is
7 not a transcript. It's not questions and answers. It's
8 not direct quotes. You can't tell from the notes when
9 they were written, if they were written before the
10 interview or after the interview.

11 Many of you have taken notes during this trial.
12 Think for a moment if it would be fair to confront some
13 witness with your notes and call them a liar based on what
14 you wrote down. Think for a moment if your notes are a
15 transcript, a verbatim transcript, or whether they mix in
16 your own thoughts, your own views and questions, your own
17 speculation, your own observations from multiple sources
18 of information that you may be looking at while you are
19 also talking to this person. Notes of a third party are
20 just that, notes of a third party, nothing more, nothing
21 less.

22 And it's just as plausible for Mr. Kaiser's
23 testimony was consistent with those notes. You can't
24 conclude they were inconsistent. At the end of the day
25 there is a reason why we don't run trials on notes. There

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1 is a reason that these people come in here and testify in
2 person. They are subject to cross-examination, subject to
3 your scrutiny. That's the best evidence. That's what you
4 should consider.

5 Enough said about notes.

6 Mr. Haley also said, well, if there is a reason
7 to doubt, if you think on cross that any of the witnesses
8 may not have told the truth, that is reasonable doubt.
9 That's actually incorrect.

10 As the judge will instruct you, reasonable doubt
11 is a doubt based upon reason and common sense. It is a
12 doubt that a reasonable person has after carefully
13 weighing all of the evidence, all of the evidence.

14 One witness, a remark that maybe you think is
15 mistaken or you don't believe doesn't equal reasonable
16 doubt. You have to consider all of the evidence.

17 The government called 39 witnesses in this case,
18 multiple victims, every John Doe. They told you their
19 story. That's what you have to consider; all of them.

20 Mr. Haley said look at the line of credit
21 statements. You will see some of them went to -- sorry.
22 You will see Mr. Mascarella testified he assumes that the
23 bank sent some of those line of credit statements to the
24 hockey players. But if you look at the line of credit
25 statements that he put into evidence, Kenner 210, in that

5994

1 big stack you will see two things in those documents.

2 One, most of those line of credit statements are sent to
3 Phil Kenner's house, 10705 East Cactus Road, Scottsdale,
4 Arizona. It's right there, Brian Berard, then 10705 East
5 Cactus Road, Scottsdale, Arizona.

6 Mr. Haley said he didn't have an explanation for
7 that but Mr. Mascarella had an explanation; told you when
8 he met Kenner and he sat down at that lunch with other
9 bank officials, Kenner told him -- this is 907 -- he said
10 that he wanted to be the intermediary between the hockey
11 players, that he did not need the bank to provide any kind
12 of investment management or fiduciary help, that he would
13 do it all and he said that he wanted everything to run
14 through him. That's the explanation.

15 The other thing you will notice in that big
16 stack of bank documents, you will notice it in the box,
17 government 770, the box Daryl Sydor sent back, you will
18 notice none of that paper shows you where the money went,
19 none of it because only Kenner knows what he used the
20 money for. Only he could tell the players and he didn't
21 tell the players.

22 Now let's talk about Constantine's involvement
23 in the Hawaii project.

24 Mr. LaRusso says Constantine earned his millions
25 of dollars in consulting because he sent a few e-mails to

5995

1 a guy named Ken Loach (ph). Those were pretty valuable
2 e-mails. Look at this. Tim Gaarn came in and testified
3 he introduced someone to someone else to someone else who
4 ended up getting them the Lehman loan at Cabo. As a
5 result, Tim Gaarn got \$200,000. Crazy? Yeah; a little.
6 At least he did something.

7 Mr. Constantine before the Urban Expansion loan
8 did nothing for Hawaii but when you look at the exhibit,
9 41B shows you, it adds it all up, all the money
10 Mr. Constantine gets from Hawaii before the Urban
11 Expansion loan; over a million dollars. A million dollars
12 for nothing. And none of the players knew. Even Sergei
13 Gonchar on the stand shown for the first time that money
14 from his line of credit was going to his friend Tommy
15 Constantine. He looked shaken. He looked up and he said:
16 We never discussed money going to Constantine Management
17 Group.

18 And then you have the Urban Expansion. This, I
19 would submit, is another essential example of the
20 conspiracy. The Urban Expansion loan was completely
21 unnecessary. It was completely unnecessary. Its sole
22 purpose was so that Kenner and Constantine could steal
23 money.

24 Let me go back and explain why.

25 You remember the Hawaii Project loan? I will

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1 show you the timeline of the Hawaii Project. Government
2 Exhibit 50. When you look at the Hawaii Project and you
3 look at this timeline, you see that one by one they are
4 trying to close on these properties. And in order to
5 close on that third property, Waika Puna, they need some
6 money. So what does Kenner do? He takes out the Centrum
7 loan. You remember the Centrum loan. The Centrum loan is
8 the one where they take parcel 2, the land they just
9 bought for \$3.5 million, they take the players' money, 3.5
10 million goes to buy parcel 2, then they take 3.5 million
11 out in the form of a mortgage. You see what is happening.
12 They are laundering money through the land.

13 Kenner takes out the whole value of parcel 2,
14 sucks the equity out and he is supposed to use that to buy
15 Waika Puna but he doesn't. He sends that money to Mexico.
16 He told you he sent it to Mexico. The bank records show
17 he sent it to Mexico. Manfredi told you. He told you at
18 the time he sent it to Mexico instead of using that money
19 on the Hawaii land project developing the project. He
20 used it for personal use to get an interest in that resort
21 in Cabo. He also tells you that Lehman is interested. In
22 2005 Lehman is interested in investing in Hawaii but
23 Kenner puts them off for another year and he sets up the
24 Urban Expansion loan, a loan that would not have been
25 necessary if he used the Centrum money as he was supposed

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1 to or let Lehman come in a year early. Instead he sets up
2 this is a sweetheart deal. He sets up the deal for Kenner
3 and Constantine. He sets up a loan with a prepayment
4 penalty he knows will get paid because he knows Lehman is
5 coming in and that they are going to pay it off before the
6 five years. And he knows that that extra 2 million is
7 going to come through for him and his friend whether that
8 prepayment penalty is legitimate or not. You remember the
9 testimony of Jim Gardenia, not a hard money lender; maybe
10 prepayment penalties are common with hard money. He told
11 you he was an entrepreneur not a hard money lender. He
12 didn't insist on the prepayment penalty, Constantine did.

13 There is no evidence that prepayment penalty
14 came from anyone but the criminal co-conspirator. So they
15 set up the loan where they are going to get a big payout
16 when Lehman comes in the next year and Lehman has to pay
17 Urban Expansion \$7 million. At that time, this is
18 important, at that time when \$7 million goes to Urban
19 Expansion in August of 2006, to Constantine and Kenner's
20 benefit, if they had just put that money toward the
21 players' accounts, the players would have lost nothing.
22 The lines of credit would have been fully paid off. The
23 Pecas would still have a safety net. But Kenner and
24 Constantine stole the money. Has nothing to do with
25 Lehman going bust later. Nothing to do with the market

5998

1 downturn in real estate. The Urban Expansion loan was
2 just a scheme to steal money.

3 Mr. Haley claims we wouldn't be here if Ken
4 Jowdy paid his loan back. You know that suggests it's
5 okay to take people's money, use it for something they
6 didn't authorize as long as you put it back and don't get
7 caught. That's not the law. It's not okay to take
8 people's money and put it at risk without letting them
9 know. It's not your money. It's other people's money.

10 Mr. Kenner testified that he thought that lines
11 of credit were cash that was sitting around. It was not
12 cash sitting around. It was the players' retirement
13 funds. It wasn't his to play with.

14 And you heard victim after victim, line of
15 credit holder after line of credit holder, Peca, Sydor,
16 Nolan and Murray, all of them told you when they opened up
17 their lines of credit, it was supposed to go only for
18 Hawaii, not for anything else, not for Mexico, not for
19 Constantine, not for the defendants' pockets.

20 And most preposterous, the most preposterous
21 suggestion from the defense, somehow the players all
22 decided, got together and made a collective decision to
23 allow those lines of credit to go into default and
24 collateral to be seized. Are you insane? Is the theory
25 really that each hockey player volunteered to lose a

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1 million dollars so they could instead put another quarter
2 million dollars into a lawsuit against a guy in Mexico? A
3 collective decision? Not only implausible, it's
4 contradicted by the evidence.

5 Kristin Peca told you when she got the default
6 letter, she was in shock. You heard the tape between her
7 and Mr. Kenner. She said: Phil, at least common decency,
8 couldn't you have given us a heads-up? He didn't say:
9 Kristin, you made a collective decision or Michael. He
10 said: I apologize. All I can do is apologize for that.

11 All the text messages they showed you, they
12 don't contradict. They are consistent; Berard, Peca,
13 Sydor. They all testified when they learned, they asked
14 the financial advisor what was going on, he said: Don't
15 worry about it, I've got it under control. Don't worry
16 about it.

17 Kenner made some attack on Jay McKee not knowing
18 about his line of credit; must be a mistake. James McKee
19 doesn't have a line of credit. That was just probably a
20 mistake. Let's let that one go.

21 All right.

22 Now, Mr. Kenner -- Mr. Haley said at the end of
23 the day the players got approximately 40 percent of their
24 money back both in their cash investments and in lines of
25 credit. That's just not true. You can look at the actual

6000

1 statements from Northern Trust. They are in evidence;
2 Government Exhibit 2162 through 2184. You will see that
3 their lines of credit were partially paid down in August
4 of 2006, could have been fully paid down when Lehman came
5 in but as Mr. Haley said, for Peca, Rucchin, Murray and
6 Nolan, Kenner borrowed all the money back again. The
7 defendants took all that money again. And when those
8 lines of credits went into default, those guys got wiped
9 out to the full extent of the loan. They didn't get 40
10 percent back ever. That's a lie.

11 Now, Mr. LaRusso suggested that Constantine is a
12 good guy because he recognized some investment that Juneau
13 gave. Juneau thought he had 5,000 in the airport. He
14 said you have 50,000 in the airport. Mr. LaRusso made the
15 comment he could have put the extra 50 in his pocket, he
16 didn't. He did. Juneau wanted out of the airport deal.
17 He wanted money. He wanted cash. And he testified that
18 initially Constantine looked like he was going to give him
19 his money back, then he said he had to pay his lawyers or
20 something and couldn't give him money anymore so instead
21 he gave him a plane but that ended up being worthless and
22 Juneau couldn't resell it. It ultimately crashed. Why
23 did he give him the plane? Remember where it comes from.
24 Constantine evicted from his house, he gives his friend
25 Eric Edenholm 450,000 from the Global Settlement Fund and

6001

1 Edenholm buys the house so Constantine lives in it and
2 Constantine gives Juneau Edenholm's plane. He absolutely
3 benefitted from it. And on top of that, based on what he
4 told Tyson Nash about the GSF, they told him he would get
5 an interest or plane. Tyson Nash got no interest in the
6 Cessna 414, no interest. It crashed.

7 Let's talk about the GSF.

8 So Mr. LaRusso says, well, the tax -- the
9 government not calling Mr. Semple in the affirmative case
10 must be we didn't like his answers, suggested it was
11 irresponsible for rejecting Mr. Semple's analysis. You
12 heard Bob Semple's testimony. This is a guy who told you
13 he didn't do forensics on it, didn't do a certified audit
14 or review. He never finished the engagement. He doesn't
15 even know the account number for the account he is
16 analyzing. He got the bank statements a month ago, didn't
17 care to look at them. He credited lines to the defendants
18 when he had no backup for it, trusting their word. And
19 there was about \$300,000 in expenses he had no backup for
20 whatsoever. In his own words, he hit a brick wall.

21 I suggest to you that it's irresponsible not to
22 reject his testimony. It was completely unreliable,
23 completely unreliable. He admitted his analysis wasn't
24 complete, he didn't do his homework, admitted he was a
25 long-time friend of Constantine's, not just an independent

6002

1 accountant but a business partner of Mr. Constantine, a
2 guy who invested in a plane with Mr. Constantine, a guy
3 with an interest in getting a plane, the Falcon 10 the
4 government seized, back for him and his other partners,
5 not an independent accountant that did a thorough
6 analysis. Even Mr. Semple after that admitted he could
7 not conclude all the funds in the GSF were used for their
8 intended purpose. That's a reason to listen to him and
9 keep going and keep investigating. Actually, look at the
10 bank statements where the money went, not shut the
11 investigation down.

12 They also rely on Mr. Gonchar who
13 Mr. Constantine uses to justify paying various lawyers and
14 race cars and Playboy. Mr. Gonchar testified. Mark
15 D'Ambrosio comes in here and says some of the money was
16 supposed to go to Gonchar.

17 The explanation for any of the personal expenses
18 those guys have, at the end of the day, here is what you
19 need to know about Gonchar, he speaks only for himself,
20 not for the rest of the players. He wasn't there. You
21 heard the questions about the GSF with the defendants. It
22 was him, his wife and the kids in the room, no other
23 hockey players there. Each of the other players came into
24 this courtroom and told you in their words what they
25 understood the Global Settlement Fund to be for. They

6003

1 told you what their understanding was, what they
2 authorized, what they didn't authorize. They told you in
3 no uncertain rules, Rucchin, Peca and all the rest, McKee,
4 they told you that they did not authorize their money to
5 be used for the defendants' pet projects or personal use.

6 Gonchar had his own interest. The defendants
7 told him what he needed to hear. Gonchar was the one guy
8 who actually had a personal loan, personal guarantee, out
9 on this plane. He was liable, being sued by the bank for
10 1.3 million. And Tommy Constantine used GSF money to get
11 Gonchar and Kenner, the two people sued, off the hook for
12 that loan. Gonchar is the one guy who got a benefit out
13 of the Global Settlement Fund. He is the one guy that put
14 in 1.3, 1.5 and got out that value. He is not like the
15 other players. He is also the one guy that got money back
16 from Eufora. You heard he got monthly payments in the
17 amount of approximately \$6,000 in 2009 and he thinks he
18 has 6 percent of Eufora although Mark D'Ambrosio couldn't
19 confirm that; the chart with no numbers. Who knows.

20 You know at the end of the day Mr. Gonchar
21 thinks Constantine helped him out with a 1.3 million loan
22 and he thinks he has an interest in Eufora and he had no
23 idea Constantine was stealing from his line of credit in
24 Hawaii. That's really all you need to know to explain Mr.
25 Gonchar.

6004

1 THE COURT: It's 4:30, Ms. Komatireddy, so you
2 have to wrap it up.

3 MS. KOMATIREDDY: It will take me about five
4 minutes.

5 THE COURT: Okay.

6 MS. KOMATIREDDY: Here is the thing: Global
7 Settlement Fund. They threw out different numbers and
8 players. The defense is trying to get you mired in
9 complicated math; not necessary. The math is simple. You
10 know two things for sure beyond dispute. Only \$225,000
11 went to Ron Richards for legal fees to fight Ken Jowdy
12 with that Cabo investment, only \$225,000.

13 The other thing you know, all the GSF money is
14 gone. So all these players who told you that they put in
15 a quarter million dollars, the rest of the money was
16 misused. They were clear about that. They were clear
17 because think about where they were in their lives. These
18 people just lost their lines of credit. They lost their
19 retirement funds after years of trusting Kenner and
20 Constantine. They were scared. And this was their one
21 last hope.

22 The Global Settlement Fund wasn't something to
23 just throw more money away on more investments; had a
24 reason. If you look at the testimony, it's very specific.
25 Look at McKee's testimony. Look at Peca, Rucchin. All

6005

1 tell you the same thing; our only hope was of all the
2 investments, Cabo looked like the only promising
3 investment. The purpose was to hire a lawyer to get
4 control of Cabo from Ken Jowdy. Once you have control, to
5 sell it and it would be so valuable that everybody would
6 be made whole.

7 These guys lost their retirement funds. It's
8 their last hope. That's why they are putting money into
9 the fund.

10 And remember what the Pecas told you; Tommy
11 Constantine got on the phone in their living room and told
12 them that he had someone who was going to go buy Cabo if
13 they could get control. There was a seller within reach.
14 That's why they put money into that Global Settlement
15 Fund, not for the plane which, by the way, has been resold
16 at least four times. You guys saw that. Not for the
17 hangars; resold, long gone. Not for the Palms Condos
18 which Kristin Peca told you they were never involved with.
19 They were fed up with the Palms Condos. Not for any other
20 reason. They put it in to get control of Cabo from Jowdy.
21 The fraud was complete. The conspiracy is complete when
22 Kenner and Constantine went on their little tour of
23 everybody's homes and hometown restaurants and recruited
24 everyone to contribute to that fund for that reason. And
25 then they kept propagating with conference calls. What

6006

1 did the players tell you? They talked about Jowdy and
2 suing Jowdy. They kept the specter specter going. They
3 knew that's what was important.

4 You look at that e-mail. Defense criticizes us
5 for calling all these lawyers. You look at that e-mail
6 and you see the fraud. Mr. LaRusso says there couldn't
7 have been more details. Actually, there could have been.
8 They used the word "various legal fees." Every player
9 told you they understood that to mean legal fees to fight
10 Jowdy to get Cabo, not Playboy, race cars, the permission
11 to land helicopters. They are the ones who hid behind all
12 of these lawyers, that's why you had to hear from the
13 lawyers, to show that the money was used for personal use,
14 not for what they said it would be. And it was both
15 Kenner and Constantine who benefitted from the Global
16 Settlement Fund. Both of them. Because remember that
17 plane? It was Kenner who was getting sued for that plane.
18 And who bought it from him? Constantine. He put no money
19 in of his own; got it all from the Global Settlement Fund.
20 What he didn't put on it he put on a Constantine loan.

21 Look at the aircraft purchase agreement,
22 \$215,000 loan just payable to himself. Remember the
23 hangars? It was Constantine on the hook for the hangars,
24 the Palms Condos. Constantine was the borrower and Kenner
25 was the guarantor. Those two were in huge debt, not the

6007

1 players, except for Gonchar. They needed the money for
2 their own projects. But they told the players, the
3 players needed to hear, to part with their money. As soon
4 as the money is gone, the fraud is complete.

5 Led Better, straightforward. Kenner admitted to
6 you he used the money for a non-Hawaii purpose, said a
7 loan, never told Peca about the loan. Michael Peca didn't
8 know even if the loan existed. That's another story. I
9 think you heard enough argument about that. The Led
10 Better scheme is open and shut; took Michael Peca's money,
11 went and used it on his own little piece of land here in
12 Sag Harbor to cover up, made payments on Peca's line of
13 credit until 2009.

14 The last two pages are the charged wires. You
15 have a stipulation in evidence that tells you basically
16 those wires were interstate wires. All in the binder.
17 All there; open and shut.

18 The last thing I will address, the last thing I
19 will address is the defendants making fun of the victims
20 for saying "I don't recall."

21 Rick Rozenboom came in here as a banker. It's
22 his job; finance guy. He came in here and told you having
23 reviewed all of the records, and he read the Bates numbers
24 into the record, told you he had thousands of pages of
25 records of exactly the money he was overseeing, what it

6008

1 was used for and why. The victims didn't have those
2 records. They have never had those records. That was
3 part of the scheme. When Tyson Nash asked for records,
4 Kenner responded you know what, there is a rat somewhere.
5 You find me the rat, you will get your documentation.

6 When Kristin Peca asked for records, he said: I
7 don't have any, when they were sitting in his house. When
8 Jay McKee asked for records, he texted him back with just
9 evasion and conspiracy.

10 You have all these exhibits in evidence.

11 At the end of the day, the victims all told you
12 one thing, Kenner was their only link to getting their
13 money back. Kristin Peca told you Kenner once told her:
14 If a plane goes down, I'm in it, you will never recover
15 anything. They hired Kenner to be their financial advisor
16 and he kept them in a state of desperation. He kept them
17 hanging on by a thread, his thread, because he was the
18 puppet master.

19 That Home Depot tape is right. In the privacy
20 of the company of just the two of them, you hear all of
21 the fraud come out and you see that the fraud is simple.
22 Millions of dollars go from the victims' bank accounts to
23 the defendants' pockets and pet projects. That's never
24 what they intended. And those people came in here and
25 testified and they all told you their piece of the story,

6009

1 that they only had one piece.

2 You, the 14 of you, saw all of the pieces come
3 together. For the first time in this courtroom, all of
4 you saw the facts come out. And you collectively know
5 more than all of the victims, all of the investors, all of
6 the middle men, everyone who came before you. You
7 collectively are smart enough to see this for what it is,
8 it's fraud and the fraud ends now.

9 Find them guilty.

10 THE COURT: Members of the jury, that completes
11 the summation.

12 So tomorrow, the schedule will be as follows:
13 We will come in at 9:30. I will give you my instructions
14 on the law, which, unfortunately, will take most of the
15 morning to do that, and then we will order your lunch in
16 the morning.

17 My hope is right around lunchtime, you will
18 begin your deliberations.

19 Again, I want to emphasize when you come in
20 tomorrow morning, you can't discuss the case yet. It's
21 not time to deliberate. You will have as much time as you
22 need. You have to wait for the instructions on the law.

23 Don't read or listen to anything regarding the
24 case. Don't discuss the case.

25 Have a safe trip home and good night.

6010

1 (The jury leaves the courtroom.)

2 THE COURT: Please be seated.

3 What I would like you to do tonight is get all
4 your exhibits together and to have an index so that
5 opposing counsel can see what you believe is in evidence
6 and have it in a stack on the table here so that whatever
7 exhibits they want, they will have immediately available.
8 If it's possible, they can ask for everything.

9 Defense counsel had a chance to look at the
10 redacted indictment? I ask you do that tonight. I will
11 send them back in with the verdict sheet. I think I
12 posted it over the weekend.

13 Anything else we need to address?

14 MR. MISKIEWICZ: No, your Honor.

15 MR. HALEY: Just on 210.

16 MR. MISKIEWICZ: We agreed it can come in.

17 MR. HALEY: That was a matter still open for me.

18 THE COURT: Any issues, Mr. LaRusso?

19 MR. LaRUSSO: Judge, I guess listening to the
20 government's proposed summation, they are talking about
21 the Eufora fraud as a fraud by omission. Then I looked at
22 your charge and it's my understanding to be a fraud by
23 omission, there has to be some legal, professional or
24 contractual duty to make such disclosure that the
25 defendant actually knew such disclosure was required to be

6011

1 made. There is no evidence in the record, Judge, that
2 Mr. Constantine had any legal, professional or contractual
3 duty and certainly no evidence that he knew he had that
4 kind of responsibility. And now that their theory of the
5 case in regards to Eufora, part of Eufora at least, is a
6 theory of fraud by omission, I'm finding it very hard to
7 see any evidence to support that. I'm toying with the
8 idea of a charge to the jury but it's probably a more
9 accurate motion to dismiss that part of the case.

10 THE COURT: Couldn't it be guilty of aiding and
11 abetting Mr. Kenner in his duty as a financial advisor if
12 both of them know that the players aren't being told that
13 they are selling their shares in Eufora? He is aware of
14 that and working with Mr. Kenner. Why can't it be aiding
15 and abetting Mr. Kenner's omission of telling the players,
16 by the way, Mr. Constantine and I are getting rid of our
17 shares in Eufora. So it could be through an aiding and
18 abetting theory.

19 MR. LaRUSSO: To be aiding and abetting, you
20 have to have knowledge there is some kind of obligation.
21 I don't know if there is evidence in the record to show
22 that.

23 THE COURT: Certainly evidence in the record to
24 support Mr. Constantine knew Mr. Kenner was the financial
25 advisor for these clients, that he wasn't a friend making

6012

1 investments.

2 MR. LaRUSSO: I don't think there is any direct
3 evidence. I don't think I can seriously argue it to the
4 contrary. Nobody testified Mr. Constantine knew he was
5 the financial advisor.

6 THE COURT: Circumstantial evidence at a
7 minimum. The nature of the relationship, it was not just
8 a friend. He was their financial advisor and that,
9 therefore, again, not suggesting that's the only
10 conclusion they can draw but I have to assume for that
11 purpose they credit the government's version of the
12 evidence and all reasonable inferences drawn in the
13 government's favor, minimum aiding and abetting theory,
14 they can find it was a material omission of certain
15 details with respect to Eufora.

16 The charge is accurate, no issue?

17 MR. LaRUSSO: No issue on that at all, Judge.

18 THE COURT: I will see you tomorrow morning
19 9:30.

20 Thank you.

21 (The trial was adjourned to Tuesday, July 7,
22 2015 at 9:30 a.m.)
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